84-429

Office-Supreme Court, U.S.
FILED
SEP 22 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

INTERNATIONAL INDEMNITY COMPANY, Applicant for Certiorari vs. JIMMY ENFINGER, by and through his next friend, JOHNNIE ENFINGER, Respondent	UNITED STATES SUPREME COURT DOCKET NO. _____ On Appeal from the Supreme Court of Georgia Case No. 41070
INTERNATIONAL INDEMNITY COMPANY, Applicant for Certiorari vs. TOMMY LEE ODOM, Respondent	Supreme Court of Georgia Case No. 41049

APPLICATION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Comes now International Indemnity Company, (IIC), Applicant for Certiorari in the above-styled companion cases, and submits this Application for Writ of Certiorari:

This single petition for Writ of Certiorari is submitted for the reason that the differences in the above-referenced cases are unsubstantial. **Armour Packing Co. v. United States,** 209 U.S. 56, 28 S. Ct. 428, 52 L.Ed. 681 (1908)

(A) Questions presented for review.

1. Does the Georgia Supreme Court's decision in **Enfinger v. International Indemnity Co.,** 253 Ga. 185, 317 S.E. 2d

816 (1984) (Enfinger) and applied in **Odom v. International Indemnity Co.**, 253 Ga. 210, 317 S.E. 2d 833 (1984) (Odom), deprive insurers, including applicant, issuing automobile liability policies containing "no-fault" coverages of the equal protection of laws guaranteed by the Constitution of the United States by discriminating against insurers issuing those policies of insurance after the inception of the Georgia Motor Vehicle Accident Reparations ("No Fault") Act, in making mandatory and as the only way to offer optional "no-fault" benefits, the securing of a multiple signature application with a separate signature space for choices as to optional coverages, while allowing for insurers who issued policies before, and/or existing on the date of the no fault act, to offer the coverages by mail without the need to assure receipt by the insured or a written response pursuant to O.C.G.A. 33-34-5 (c) (Michie 1982), prior to its amendment in 1982?

2. Was O.C.G.A. 33-34-5 (c), prior to its amendment in 1982 (Ga. L 1982, p. 1234), unconstitutionally vague and violative of insurer's due process rights as a matter of law?

3. By ruling that O.C.G.A. 33-34-5 (c) is not applicable to insurance contracts issued after the inception of the Georgia Motor Vehicle Accident Reparations Act (March 1, 1975) as a curative mechanism, did the Georgia Supreme Court create a conclusive presumption of noncompliance with the requirements of that code section to offer optional benefits that, therefore, deprives no-fault insurers, including applicant, of property without due process of law?

4. By ruling that **Enfinger** is retroactively applicable to **Odom** and other pending cases, did the Georgia Supreme Court deprive applicant and other similarly situated insurers of property without due process of law, where, based upon the gloss placed on O.C.G.A. 33-34-5 (c) by previous appellate decisions, applicant and other similarly situated insurers reasonably believed it had validly complied with the offer requirements of the No Fault Act?

5. Do the penalty and punitive damages provisions of O.C.G.A. 33-34-6 violate, as a matter of law, insurers' constitutional rights to due process and equal protection?

(B) Parties to the Proceedings.

Parties to the proceedings in the Court whose judgement is sought to be reviewed are as follows:

Jimmy Enfinger

Johnnie Enfinger as next friend of Jimmy Enfinger

Tommy Lee Odom

International Indemnity Company (both cases)

(C) Table of Contents and Table of Authorities

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(C) This case comes to this Court on Application for Writ of Certiorari from the Georgia Supreme Court in the cases styled **Jimmy Enfinger by and through his next friend Johnnie Enfinger vs. International Indemnity Company,** 253 Ga. 185, 317 S.E. 2d 816 (1984), decided June 29, 1984, rehearing denied July 25, 1984 and **Tommy Lee Odom vs. International Indemnity Company,** 253 Ga. 210, 317 S.E. 2d 833 (1984), decided July 6, 1984, rehearing denied July 30, 1984.

(D) **Jurisdiction.** The Judgements or decrees sought to be reviewed were rendered by the Georgia Supreme Court on June 29, 1984 and July 6, 1984, with applicant's motions for rehearing denied on July 25, 1984 and July 30, 1984 respectively. The present application is brought within the time allowed by 28 U.S. 2101.

The Georgia Supreme Court has granted as Stay of the Remittitur in the above-referenced cases up to and including September 27, 1984 to allow application for a Writ of Certiorari to this Court.

There is no cross petition for a Writ of Certiorari.

Jurisdiction is conferred upon this Court by the 28 U.S.C. Sec. 1257 (3) which allows review by this Court by Writ of Certiorari where the validity of a state statute is drawn into question on the ground of its being repugnant to the Consitution, treaties or laws of the states, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised, under the United States.

(E) This case involves the challenge by applicant, a Georgia Insurance Corporation, to the Constitutionality of O.C.G.A. 33-34-5, particularly subsection (c). A copy of O.C.G.A. 33-34-5, as amended by Ga. L. 1975, p. 4, is attached as Exhibit 1 to the Appendix.

As originally enacted, Section 33-34-5 (referred to as former Section 56-3404b prior to the recodification of Georgia's statutory laws in 1982) did not contain subsections (c) and (d)

and would have automatically engrafted the maximum $50,000.00 in no fault bodily injury benefits (PIP) onto all policies of insurance existing on March 1, 1975 when the Act went into effect.

By amendment in 1982, Georgia Laws 1982, p. 1234, that statute deleted subsections (b), (c) and (d) and new language was inserted to change the presumption and signature requirement - that there had been an offer of the additional coverage where the application contains certain language in bold face type. A copy of the statute as amended is attached as Exhibit 2 to the Appendix.

(F) **Statement of the Case**. On March 1, 1975 the Georgia Motor Vehicle Accident Reparations Act (commonly known as the Georgia No-Fault Act), O.C.G.A. 33-34-1 et. seq., went into effect. Among other things, the Act makes mandatory the purchase and maintenance of a set amount of public liability coverage along with a minimum of $5,000.00 in personal injury protection coverage (PIP). Additionally, each insured must be offered, at the time of application, optional coverages up to $50,000.00 in PIP benefits and property damage coverages.

International Indemnity Company (IIC) was formed in 1977 to conduct insurance business in the State of Georgia, and engages in the sale and issuance of motor vehicle liability policies containing, among other coverages, PIP coverages issued in compliance with the Georgia Motor Vehicle Accident Reparations Act. After its creation in 1977, IIC issued a policy of liability insurance containing no-fault coverages to respondents (Mr. Enfinger's policy was issued on August 26, 1980 and Mr. Odom's was issued on August 5, 1977) and others similarly situated, containing $5,000.00 in no-fault benefits, based on an application submitted by or on behalf of each insured. That application, which contained only one signature as to all coverages offered, has been declared to be in noncompliance with O.C.G.A. 33-34-5 (b) in that the Courts of the State of Georgia have construed that code section to require a separate signature space to apply to responses to offerings of optional no-fault coverages, and a separate signature space to apply to all other

coverages. Applications containing fewer than the required signature spaces result in the imposition of $50,000.00 in PIP coverage from the inception of the policy of insurance, as decided by the Georgia Supreme Court in **Flewellen v. Atlanta Cas. Co.**, 250 Ga. 709, 300 S.E. 2nd 673 (1983). (Flewellen).

As a matter of business policy, IIC, shortly after issuance of each policy of insurance, sent a written offer of optional personal injury protection coverages as well as property damage coverages to its insureds to solicit the sale of additional amounts of coverage pursuant to O.C.G.A. 33-34-5 (c). That conduct was based upon business considerations as well as decisions from the Georgia Court of Appeals and Supreme Court authority, as well as decisions from the United States District Courts of the State of Georgia, which created the reasonable expectation that the solicitation letter offers of optional no-fault insurance, sent after issuance of the policies, would act as a mechanism to provide the necessary offer as required by the No-Fault Act, curing any deficiency in the application forms used by IIC.

In 1980, a Georgia Court of Appeals decision, **Jones v. State Farm Mut. Auto. Ins. Co.** 156 Ga. App. 230, 274 S.E. 2nd 623 (1980) (Jones) ruled that if a policy of insurance containing no-fault benefits was issued on an application containing less than the requisite number of signature spaces, a continuing offer was created so that, post injury, an insured could "reform" his policy of insurance up to the maximum PIP benefits. That application defect could be cured, according to the **Jones** Court, by a mailed offer sent pursuant to O.C.G.A. 33-34-5 (c) (former Ga. **Code Ann.** Sec. 56-3404b [c]). **Jones** was overruled by **Flewellen v. Atlanta Cas. Co.**, 164 Ga. App. 885, 300 S.E. 2d 166 (1982), which was reversed by the Georgia Supreme Court. **Id.**, 250 Ga. 709, 300 S.E. 2d 673 (1983). **Flewellen**, decided some three years after **Jones**, modified the continuing offer theory to impose the $50,000.00 in coverage on each policy of insurance issued on a deficient application, subject to activation by payment of additional premium and submission of additional proof of loss.

The **Jones** and **Flewellen** decisions generated a multitude of law suits for optional PIP, post injury. Under the Georgia Motor Vehicle Accident Reparations Act, failure to make payment within 30 days without a reasonable basis (the burden being on the insurer to show a good faith refusal to pay) subjects the insurer to 25% bad faith penalty and attorney's fees, and the failure to pay within 60 days subjects the insured to unlimited punitive damages. O.C.G.A. 33-34-6.

Applicant did not honor the claims in excess of the minimum $5,000.00 based upon its reliance on O.C.G.A. 33-34-5 (c), applying that subsection to policies of insurance issued after March 1, 1975 as a corrective mechanism for those policies of insurance issued on deficient applications, based on such authority as **Jones v. State Farm Mut. Auto. Ins. Co.**, 156 Ga. App. 230, supra; (1980); **State Farm Mut. Auto. Ins. Co. v. Bates**, 542 F. Supp. 807 (N.D. Ga. 1982); **Shave v. Allstate Ins. Co.**, 549 F. Supp. 1006 (S.D. Ga. 1982); **Nalley v. Select Ins. Co.**, 165 Ga. App. 345, Writ withdrawn 251 Ga. 721, 310 S.E. 2d 918 (1983). Compare **Flewellen v. Atlanta Cas. Co.**, 250 Ga. 709, 714 supra.

On February 28, 1984, the Georgia Court of Appeals approved applicant's efforts pursuant to O.C.G.A. 33-34-5 (c), declaring that the subsection applied to all policies of insurance, including those issued after the inception of the no-fault act, and would operate as a corrective mechanism to rectify the infirmities of the application form used by the applicant. **International Indemnity Co. v. Enfinger**, 170 Ga. App. 443, 317 S.E. 2nd 841 (1984). Some three weeks later **Enfinger** was applied to Mr. Odom's policy, also reversing the judgement of the trial court and ruling in favor of the applicant. **International Indemnity Co. v. Odom**, 170 Ga. App. 447, 317 S.E. 2nd 844 (1984).

On June 29, 1984 the Georgia Supreme Court reversed the Court of Appeals in **Enfinger v. International Indemnity Co.**, 253 Ga. 185, 317 S.E. 2d 816 (1984) and ruled that O.C.G.A. 33-34-5 (c) does not apply to policies of insurance issued after March 1, 1975 and that, in any event, letters sent pursuant to

subsection (c) of that code section do not provide a corrective mechanism. The **Enfinger** Court made no ruling on the issue of good or bad faith of the petitioner in litigating that claim. Thereafter on July 6, 1984 the Georgia Supreme Court decided the case **Odom vs. International Indemnity Company,** 253 Ga. 210, 317 S.E. 2d 833 (1984) which applied the **Enfinger** decision retroactively. The **Odom** Court made no ruling on the good or bad faith of petitioner in litigating the claim or other similar claims.

Significantly, in **Enfinger,** the Georgia Supreme Court conceded that the interpretation given to the statute by Petitioner, the Georgia Court of Appeals and the United States District Court was one to which the statute was "susceptible," but the Supreme Court simply did not believe that the legislature intended to give that statute such broad application.

(G) Stage in proceedings where Federal Court questions sought to be reviewed were raised. Petitioner's Constitutional attack was raised in the Motions for Rehearing filed with the Georgia Supreme Court. This Court has ruled that raising the issue of the constitutionality of a state statute in a Motion for Rehearing before the Georgia Supreme Court is sufficient to invoke this Court's appellate jurisdiction., where the Georgia Court rules on the issue. **Cox Broadcasting Corporation v. Cohn,** 420 U.S. 469, 476, 95 S. Ct. 1029, 43 L.Ed. 2nd 328 (1975). Moreover, this case falls within the exception to the general rule-that attempting to raise a federal question after judgement, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it. In this case the question respecting the validity of the statute concerns its application by the Georgia Supreme Court which first arose from the unanticipated ruling in **Enfinger** and **Odom** giving to the statute a new construction which threatens rights under the constitution. **Missouri v. Gehner,** 281 U.S. 313, 50 S.Ct. 326, 74 L. Ed. 870 (1930); **Brinkerhoff-Faris Trust & Savings Co. v. Hill,** 281 U.S. 673, 677-678, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

(H) As shown previously under the **statement of the case**, the ruling of the Georgia Supreme Court in the above-referenced cases could not have been anticipated due to the body of law construing subsection (c) of O.C.G.A. 33-34-5, upon which the petitioner had relied, and which decisions the Georgia Supreme Court earlier had the opportunity to review and reverse but chose not to do so. Under Georgia Law the interpretation given to a statute by the State's appellate courts becomes a part of the statute, upon which the citizens of the State are entitled to rely as though enacted by the General Assembly. **Williams v. Ray,** 146 Ga. App. 333, 246 S.E. 2d 387 (1978). By its rulings in **Enfinger** and **Odom** the Georgia Supreme Court gave a new and unexpected interpretation to O.C.G.A. 33-34-5 (c), or at least reversed its prior interpretation (which arose by tacit approval of the Court of Appeal's interpretation or refusing to review and reverse same). Cf **Pruneyard Shopping Center v. Robins,** 447 U.S. 74, 85, n9, 100 S. Ct. 2035, 64 L.Ed. 2d 741 (1980).

(I) Direct and concise argument amplifying the reasons relied on for allowance of writ.

This is the case of special and important questions concerning federal law and importance to the public.

The rights of insurance corporations, like any other citizen, are protected by the United States Constitution and are entitled to equal protection and due process under the 14th amendment. **The Home Ins. Co. of New York v. Morse,** 20 Wall (U.S.) 445 (1874); accord, **Safeguard Mut. Ins. Co. v. Miller,** 472 F. 2nd 732 (3rd Cir. 1973).

The Petitioner's application is based upon its firm belief that certain portions of the Georgia Motor Vehicle Accident Reparations Act, particularly O.C.G.A. 33-34-5 (c), are violative of the 5th and 14th amendments to the United States Constitution and are, therefore, unconstitutional.

First, O.C.G.A. 33-34-5 (c), prior to its amendment by Georgia laws 1982, p. 1234, was unconstitutionally vague in that the statute, prior to its definitive interpretation by the Georgia Supreme Court in **Enfinger v. International Indemnity Co.** did

not give fair notice of such requirements and reasonable men were incapable of ascertaining its true meaning. The statute's requirement for plural signatures on no fault applications was vague. (see **Cotton States Mut. Ins. Co. v. McFather**, 251 Ga. 739, 743, 309 S.E. 2d. 799 [1983]), but the statute's provision for "automatic" maximum PIP coverage, absent plural signatures was also virtually imperceptible. Moreover, the Georgia Courts had ruled that a mailed offer, sent after issuance of a policy on a deficient application, would supply the required offer, even though no signature from the insured was necessary, and the mere passage of time without a response constituted a rejection. **Jones v. State Farm, etc.**, 156 Ga. App. at 233 (policies issued in 1977); **State Farm, etc. v. Bates**, 542 F. Supp. 807, supra; **Shave v. Allstate Ins. Co.**, 549 F. Supp. at 1012 (subsection c is a corrective mechanism for all policies, not just those issued before March 1, 1975); **Nalley v. Select Ins. Co.**, 165 Ga. App. 345, supra (applying subsection c to a policy issued in November, 1975 and renewed August 23, 1977); s.c. writ dismissed 251 Ga. at 722, note 1, supra: Court of Appeals' decision is one "possible" construction). Cf **Flewellen v. Atlanta Cas. Co.**, 250 Ga. at 714, supra (O.C.G.A. 33-34-5 [b] provision, that $50,000.00 maximum coverage is imposed where a policy application contains fewer than two signatures, is not an unforeseen penalty: "see also O.C.G.A. 33-34-5 [c] ...."). Any contrary indication, prior to **Enfinger** and **Odom**, was obiter dictum. See **Wiard v. Phoenix Ins. Co.**, 251 Ga. 698, 310 S.E. 2d 221 (1983); **Stafford v. Allstate Ins. Co.**, 252 Ga. 38, 311 S.E. 2d 437 (1984) (policies in both cases were issued before March 1, 1975 and the issues concerned the sufficiency of the proof of mailing and the contents of the offer.)

Hence, Petitioner was given no reasonable opportunity to know what conduct was prohibited - and a fortiori what was required. As in **United States v. L. Cohen Grocery Co.**, 255 U.S. 81, 41 S. Ct. 298, 65 L.Ed. 516 (1921), the vagueness of the statute, as well as its constitutional infirmity, is demonstrated by the "conflicting results which have arisen from the painstaking attempts of enlightened judges in seeking to carry

out the statute in cases brought before them...." **Id.**, 255 U.S. at 89-90. This standard applies also in civil cases. **A.B. Small Co. v. American Sugar Refining Co.**, 267 U.S. 233, 45 S. Ct. 295, 69 L.Ed. 589 (1925); compare **International Indemnity Co. v. Woods**, 169 Ga. App. 830, 315 S.E. 2d 20 (1984); **First of Georgia Underwriters Co. v. Beck**, 170 Ga. App. 68, 316 S.E. 2d 59 (1984) (regardless of the efficacy of subsection [c] to cure a defective application, an insured suffering an injury within the thirty day period following the mailed offer has the maximum coverage vested as of the date of the injury); with **International Indemnity Co. v. Lott**, 170 Ga. App. 728, S.E. 2d (1984) (where another panel of the Court of Appeals ruled directly opposite to **Woods** and **Beck** - the failure to respond within 30 days of the mailed offer constitutes a rejection).

Petitioner's right to procedural due process is also infringed upon by the fact that the statute, according to **Enfinger** and **Odom**, creates an irrebuttable presumption that an applicant is not offered optional PIP unless plural signatures appear on an application. Other evidence cannot be introduced regarding the intent of the parties. **Colwell v. Voyager Cas. Co.**, 251 Ga. 744 (2), 309 S.E. 2d 617 (1983); **Tolison v. Farm Bureau Mut. Ins. Co.**, 253 Ga. 97, 101, 317 S.E. 2d 185 (1984). Section 33-34-5 (c), as interpreted in **Enfinger** and **Odom**, violates Petitioner's substantive due process rights because the consequence of failing to obtain more than one signature is unfair and bears no reasonable or rational relationship to the legislative goal of the No Fault Act. See also O.C.G.A. 33-34-5 as amended by Ga. L. 1982, p. 1234 (applications with bold face type now carry a sufficient offer).

The Georgia Supreme Court's decision to apply its **Enfinger** interpretation of O.C.G.A. 33-34-5 (c) retroactively, despite the insurance industry's obvious and understandable inability to decipher correctly the meaning of subsection (c) prior to **Enfinger** and **Odom**, particularly based upon the gloss placed on that statute by previous decisions of the Georgia Court of Appeals, the Georgia Supreme Court and The United States District Courts, grossly offends the guaranty of due process un-

der the United States Constitution. United States Constitution amendments V and XIV. Given the penal nature of the No Fault Act and the great difficulty exhibited by numerous trial and appellate judges in understanding the meaning of subsection (c), subjecting the insurance company to millions of dollars in losses for its failure to guess correctly as to the meaning of subsection (c) is patently unfair.

Second, the penalties and punitive damages provisions of the No Fault Act contravenes the insurance company's right to due process and equal protection under the United States Constitution. The United States Constitution Amendments V and XIV. O.C.G.A. 33-34-6 (b) provides for double penalties for the same conduct (i.e., nonpayment of a no-fault claim within 30 or 60 days of appropriate documentation) as well as providing for punitive damages in contract cases, all of which is contrary to the Georgia law applied both in noninsurance cases and in all other types of insurance cases. In seeking to avoid the imposition of these erroneous double penalties and punitives, insurance companies must carry the burden of proof in establishing their good faith and refusing to pay claims within the statutory time periods. In all other instances respecting an allegation of bad faith, the party claiming that his opponent acted in bad faith must carry the burden of proof. No fault insurers, including petitioner, therefore, have been subjected to an unconstitutional double standard respecting penalties suffered for refusing to pay claims and a statutorily timely manner, and their consequent loss of property is without any rational foundation and violates due process as well.

(J) Appendix:

Exhibit 1 O.C.G.A. 33-34-5, as amended by Ga. L. 1975, p. 4.

Exhibit 2 O.C.G.A. 33-34-5, as amended by Ga. L. 1982, p. 1234.

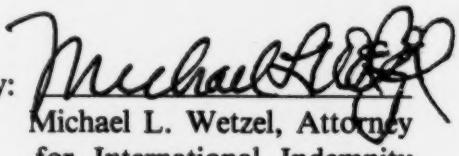
Exhibit 3 **International Indemnity Co. v. Enfinger,** 170 Ga. App. 443, 317 S.E. 2d. 841 (1984).

Exhibit 4 **Enfinger v. International Indemnity Co.,** 253 Ga. 185, 317 S.E. 2d 816 (1984).

Exhibit 5 **Odom v. International Indemnity Co.**, 170 Ga. App. 44, 317 S.E. 2d 844 (1984).

Exhibit 6 **Odom v. International Indemnity Co.**, 253 Ga. 210, 317 S.E. 2d 833.

Respectfully submitted,
GURLEY & FOWLER, P.C.

By: 
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AFFIDAVIT OF SERVICE

Comes now Michael L. Wetzel, who, after being duly sworn, deposes and states:

I have this day served Robert P. Wildau, Esq., attorney for Tommy Lee Odom and Ben Kirbo, Esq., attorney for Johnnie Enfinger as next friend of Jimmy Enfinger with a copy of this Petition for Writ of Certiorari by depositing same in the United States Mail in an envelope addressed with adequate postage to:

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This 21 day of September, 1984.

Michael L. Wetzel
Attorney for International
Indemnity Company

Sworn to and subscribed to before me this 21 day of September, 1984.

John B. Mangrum
Notary Public
Commission expires 9-6-88

TABLE OF AUTHORITIES

CONSTITUTIONS AND STATUTES

Amendments V and XIV, United States Constitution

Official Code of Georgia Annotated (O.C.G.A.), Sections 33-34-5 and 33-34-6. (Michie 1982)

Case Authority

Brinkerhoff - Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451, 74 L.Ed. 1107 (1930).

Colwell v. Voyager Casualty Co., 251 Ga. 744, 309 S.E. 2d 617 (1984).

Cotton States Mutual Insurance Co. v. McFather, 251 Ga. 739, 309 S.E. 2d 799 (1983).

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 95 S. Ct. 1029, 43 L.Ed. 2d 328 (1975).

Enfinger v. International Indemnity Co., 253 Ga. 185, 317 S.E. 2d 816 (1984).

Flewellen v. Atlanta Casualty Company, 250 Ga. 709, 300 S.E. 2d 673 (1983).

Flewellen v. Atlanta Casualty Company, 164 Ga. App. 885, 300 S.E. 2d 166 (1982).

First of Georgia Underwriters Company v. Beck, 170 Ga. App. 68, 316 S.E. 2d 519 (1984).

International Indemnity Co. v. Enfinger, 170 Ga. App. 443, 317 S.E. 2d 841 (1984).

International Indemnity Co. v. Lott, 170 Ga. App. 728, S.E. 2d (1984).

International Indemnity Co. v. Odom, 170 Ga. App. 447, 317 S.E. 2d 844 (1984).

International Indemnity Co. v. Woods, 169 Ga. App. 830, 315 S.E. 23 20 (1984).

Jones v. State Farm Mutual Automobile Liability Ins. Co., 156 Ga. App. 230, 274 S.E. 2d 623, writ dismissed 248 Ga. 46, 280 S.E. 2d 837 (1980).

Jones v. Swett, 244 Ga. 715, 261 S.E. 2d 610 (1979).

Missouri v. Gehner, 281 U.S. 313, 50 S. Ct. 326, 74 L.Ed. 2d 870 (1930).

Nalley v. Select Insurance Company, 165 Ga. App. 345, 299 S.E. 2d 172, writ withdrawn 251 Ga. 721, 310 S.E. 2d 918 (1983).

Odom v. International Indemnity Co., 253 Ga. 210, 317 S.E. 2d 833 (1984).

Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S. Ct. 2035, 64 L.Ed. 2d 741 (1980).

Safeguard Mutual Insurance Co. v. Miller, 472 F2d 732 (3rd Cir. 1973).

Shave v. Allstate Insurance Co., 549 F. Supp. 1006 (S.D. Ga. 1982).

Small v. American Sugar Refining Co., 267 U.S. 233, 45 S. Ct. 295, 69 L.Ed. 589 (1925).

Stafford v. Allstate Insurance Co., 252 Ga. 38, 311 S.E. 2d 437 (1984).

State Farm Mutual Automobile Ins. Co. v. Bates, 542 F. Supp. 807 (N.D. Ga. 1982).

The Home Insurance Company of New York v. Morse, 20 Wall (U.S.) 445 (1874).

Tolison v. Georgia Farm Bureau Mutual Insurance Co., 253 Ga. 97, 316 S.E. 2d 466 (1984).

United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S. Ct. 298, 65 L.Ed. 516 (1921).

Wiard v. Phoenix Insurance Co., 251 Ga. 698, 310 S.E. 2d 221 (1983).

Williams v. Ray, 146 Ga. App. 333, 246 S.E. 2d 387 (1978).

APPENDIX

EXHIBIT 1

33-34-5. Optional coverages.

(a) Each insurer shall also make available on an optional basis the following coverage:

(1) An aggregate limit of benefits payable without regard to fault up to $50,000.00 per person, which may be rejected or reduced to not less than an aggregate limit of benefits payable without regard to fault of $5,000.00 per person by written consent of the policyholder. Benefits purchased in excess of $5,000.00 shall be paid as determined by the insured without apportionment to cover any of the following expenses incurred by the insured but not compensated for under paragraph (2) of subsection (a) of Code Section 33-34-4:

(A) Any expenses of the type described in subparagraph (a)(2)(A) of Code Section 33-34-4;

(B) Eighty-five percent of the loss of income or earnings during disability;

(C) Expenses of the type described in subparagraph (a)(2)(C) of Code Section 33-34-4, not to exceed $20.00 per day; and

(D) Funeral services and burial expenses not to exceed $2,000.00 per person;

(2) In the event of the death of the injured person who is survived by a spouse or dependent child or children, compensation under subparagraphs (a)(2)(B) and (a)(2)(C) of Code Section 33-34-4 shall be payable after the death as though the deceased were alive but totally disabled, the payment to be made to the spouse, if alive, and otherwise to the child or children or the person having legal custody of any child or children for use of the spouse or children as though awarded as a year's support for the spouse or children, or both. Survivor's benefits shall be payable at least monthly until exhausted;

(3) Compensation without regard to fault for damage to the insured motor vehicle not to exceed the actual cash value of the vehicle at the time of the loss, including up to $10.00 per day with a maximum of $300.00 for the loss of use of the motor vehicle, provided that benefits payable under this paragraph may be subject to deductibles at the written election of the policyholder.

(b) Each application for a policy of motor vehicle liability insurance sold in this state must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section and no policy shall be issued in this state unless these spaces are completed and signed by the prospective insured.

(c) On and after March 1, 1975, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this chapter shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this Code section; provided, however, that the failure of an insured to notify his insurer of his written acceptance or rejection within 30 days after written notice of the offer has been mailed by the insurer, postage prepaid, by first class mail to the address stated in the policy shall constitute a rejection of the optional coverage.

(d) The optional coverage required to be offered under this Code section need not be offered upon the renewal of any policy where the offer has been previously made by the same insurer and has been rejected in accordance with this Code section unless the named insured requests that coverage in writing. (Ga. L. 1974, p. 113, § 4; Ga. L. 1975, p. 3, §1; Ga. L. 1975, p. 1202, §4.)

EXHIBIT 2

33-34-5. Optional coverages

(a) Each insurer shall also make available on an optional basis the following coverage:

(1) An aggregate limit of benefits payable without regard to fault up to $50,000.00 per person. Benefits purchased in excess of $5,000.00 shall be paid as determined by the insured without apportionment to cover any of the following expenses incurred by the insured but not compensated for under paragraph (2) of subsection (a) of Code Section 33-34-4:

(A) Any expenses of the type described in subparagraph (a)(2)(A) of Code Section 33-34-4;

(B) Eighty-five percent of the loss of income or earnings during disability;

(C) Expenses of the type described in subparagraph (a)(2)(C) of Code Section 33-34-4, not to exceed $20.00 per day; and

(D) Funeral services and burial expenses not to exceed $2,000.00 per person;

(2) In the event of the death of the injured person who is survived by a spouse or dependent child or children, compensation under subparagraphs (a)(2)(B) and (a)(2)(C) of Code Section 33-34-4 shall be payable after the death as though the deceased were alive but totally disabled, the payment to be made to the spouse, if alive, and otherwise to the child or children or the person having legal custody of any child or children for use of the spouse or children as though awarded as a year's support for the spouse or children, or both. Survivor's benefits shall be payable at least monthly until exhausted;

(3) Compensation without regard to fault for damage to the insured motor vehicle not to exceed the actual cash value of the vehicle at the time of the loss, including up to $10.00 per day with a maximum of $300.00 for the loss of use of the

motor vehicle, provided that benefits payable under this paragraph may be subject to deductibles at the request of the policyholder.

(b) Each initial application for a new policy of motor vehicle liability insurance sold in this state after November 1, 1982, shall contain a statement in boldface type signed by the applicant indicating that the optional coverages listed in subsection (a) of this Code section have been explained to the applicant.

(c) All named insureds in motor vehicle liability policies in effect on November 1, 1982, shall be deemed to have signed the statement required by subsection (b) of this Code section.

(d) The provisions of subsection (b) of this Code section requiring explanation of the optional coverages shall not apply upon the renewal, replacement, reinstatement, transfer, or substitute of any policy or the addition or substitution of a motor vehicle covered by such policy. (Ga. L. 1974, p. 113, §4; Ga. L. 1975, p. 3, §1; Ga. L. 1975, p. 1202, §4; Ga. L. 1982, p. 1234, §1; Ga. L. 1983, p. 3, §24.)

EXHIBIT 3

66925, 66926. INTERNATIONAL INDEMNITY COMPANY v. ENFINGER; and vice versa.

QUILLIAN, Presiding Judge.

This case involves the construction of the following provision of the no-fault automobile liability insurance statute: "On and after March 1, 1975, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this chapter shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this Code section; provided, however, that the failure of an insured to notify his insurer of his written acceptance or rejection within 30 days after written notice of the offer has been mailed by the insurer, postage prepaid, by first class mail to the address stated in the policy shall constitute a rejection of the optional coverage." OCGA §33-34-5 (c) (Code Ann. §56-3404b (c)).

On August 26, 1980, appellant International Indemnity Company (IIC) issued an automobile liability insurance policy to cross-appellant Enfinger. Understanding the policy to provide only for $5,000 personal injury protection (PIP) benefits, on September 22, 1980, IIC sent Enfinger a letter following the requirements of the above statute, by first class mail and postage prepaid, advising him of optional PIP coverage and the additional premiums necessary for such coverage. By containing blocks to be checked, this letter conformed to the standard for such letters set down in *Wiard v. Phoenix Ins. Co.*, 251 Ga. 698, 700 (310 SE2d 221). IIC received no response to the letter from Enfinger. On October 30, 1980, Enfinger was injured in an automobile accident, and IIC paid him $5,000 PIP benefits under the policy.

On May 11 and 20, 1982, Enfinger, through his wife, requested payment of $45,000 additional PIP benefits from IIC and tendered the additional premium therefor. IIC denied the additional coverage and Enfinger commenced this action seeking the ad-

ditional PIP benefits, and penalties and attorney fees based on IIC's alleged bad faith refusal to pay the claim.

Following a pretrial hearing, the trial court held that the insurance policy issued to Enfinger provided for $50,000 PIP benefits from its inception because the application form therefor did not contain the signature spaces for the applicant to accept or reject optional coverage as required by OCGA §33-34-5 (a), (b) (Code Ann. §56-3404b (a), (b)); that IIC's letter of September 22, 1980, was ineffectual to constitute a rejection of the $50,000 PIP coverage; and that Enfinger was not entitled to attorney fees and penalties because as a matter of law there had been no bad faith refusal to pay the claim. We granted IIC's interlocutory appeal from the ruling that its notice of September 22, 1980 did not effect a rejection of optional coverage by Enfinger; and Enfinger cross-appeals from the ruling denying attorney fees and bad faith penalties. *Held:*

1. IIC now concedes that its policy application form did not comply with the signature requirements of OCGA §33-34-5 (b), supra, and therefore the insurance policy provided for $50,000 PIP benefits from its inception. This court has already examined IIC's application form and concluded such. *International Indem. Co. v. Reeves,* 165 Ga. App. 730 (302 SE2d 611).

2. IIC contends that even though its application form did not give Enfinger the opportunity to accept or reject the optional coverage because of its noncompliance with the statutory signature requirement, rejection of any optional PIP coverage was effected by Enfinger's failure to respond to its letter of September 22, 1980.

We agree as we find that Enfinger had an "existing motor vehicle liability" policy "after March 1, 1975" and had "not previously responded to an offer to accept or reject the optional coverages required to be offered." Accordingly, we reverse the contrary ruling of the trial court. *Nalley v. Select Ins. Co.,* 165 Ga. App. 345 (299 SE2d) 172).

3. In view of the foregoing finding, Enfinger's cross-appeal for attorney fees and penalties becomes moot.

Judgement reversed. Shulman, P.J., Birdsong, Carley and Sognier, JJ., concur. McMurray, C.J., Deen, P.J., Banke and Pope, JJ., dissent.

DECIDED FEBRUARY 28, 1984 –
Rehearing denied March 26, 1984 – CERT. APPLIED FOR.
Action on policy. Decatur Superior Court. Before Judge Cato.
Michael L. Wetzel, for appellant.
Ben Kirbo, for appellee.

DEEN, Presiding Judge, dissenting.

Almost without discussion, the majority opinion holds that OCGA §33-34-5 (c) may be used to "cure" noncompliance with the signature requirements of OCGA §33-34-5 (b). I find that conclusion untenable and, accordingly, must dissent from Division 2 of the majority opinion.

While OCGA §33-34-5 (c) (Code Ann. §56-3404b (c)) primarily, if not exclusively, addresses insurance policies in existence prior to the statute's enactment, the language of this subsection arguably does not exclude its application to all policies. Indeed, in *Jones v. State Farm Mut. Auto. Ins. Co.,* 156 Ga. App. 230, 233 (274 SE2d 623) (1980), this court suggested that "[i]f the application does not conform to the requirements of Code Ann. §3404 b (b), the insurer can meet its evidentiary burden by showing that it otherwise provided it no-fault insureds with 'an opportunity to accept or reject, in writing, the optional coverages required to be offered under [Code Ann. §56-3404b (a)' in compliance with the provisions of Code Ann. §56-3404b (c), and that the optional coverages were then effectively rejected." I note further that at least one federal court has characterized subsection (c) as such a "corrective mechanism." See Shave v. Allstate Ins. Co., 549 FSupp. 1006 (S.D. Ga. 1982).

However, the Supreme Court, in construing OCGA §33-34-5 (a), (b), has since decided that a policy of insurance issued after the effective date of the statute provides for $50,000 PIP benefits, *absent a signed rejection of the optional coverages by the insured. Flewellen v. Atlanta Cas. Co.,* 250 Ga. 709 (300 SE2d 673) (1983); *GEICO v. Mooney,* 250 Ga. 760 (300 SE2d 799) (1983). Application of subsection (c) to policies which were issued after the effective date of the statute would clearly result in the circumvention of the necessary, signed rejection of the optional coverages.

Subsequently, the Supreme Court has several times intimated through unequivocal dicta its approval of the limited application of OCGA §33-34-5 (c). In defining the sufficiency of a subsection (c) notice, the Supreme Court noted that the subsection was specifically enacted to address the question of optional coverages for policies in existence on the effective date, March 1, 1975. *Ward v. Phoenix Ins. Co.,* 251 Ga. 698 (310 SE2d 221) (1983), reversing *Wiard v. Phoenix Ins. Co.,* 166 Ga. App. 47 (303 SE2d 161) (1983). On December 5, 1983, the Supreme Court vacated its grant of certiorari to review this court's decision in *Nalley v. Select Ins. Co.,* 165 Ga. App. 345 (299 SE2d 172) (1983).[1] Two Justices concurred specially and three Justices dissented from that order of vacation. Chief Justice Hill, in his special concurrence which was joined by Justice Weltner, stated that *Nalley* was wrong in that it incorrectly applied subsection (c) to a policy that was issued after March 1, 1975. (The Chief Justice, however, concurred with the result in *Nalley,* finding that the supplemental application substantially complied with the subsection (b) requirements.) Justice Smith, in dissenting, also con-

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[1] In *Nalley,* this court held that subsection (c) applied where the motor vehicle liability policy was existing on August 23, 1977, at which time a supplemental insurance application was executed by the insured. Although the decision does not indicate whether the policy came into existence prior to or subsequent to March 1, 1975, and thus on its face does not stand for the proposition that subsection (c) applies to policies issued on or after March 1, 1975, review of the record in *Nalley* discloses that the policy actually was issued in November 1976. I believe that *Nalley* should be overruled.

cluded that subsection (c) did not apply to cases involving policies issued after March 1, 1975.

Even more recently, the Supreme Court has explained that "OCGA §33-34-5 (c) (Code Ann. §56-3404b) applies to policies in existence on March 1, 1975. OCGA §33-34-5 (b) (Code Ann. §56-3404b) applies to applications for policies beginning March 1, 1975. Each category of policies is governed by the respective requirements of the statute." *Stafford v. Allstate Ins. Co.*, 252 Ga. 38, 40 (311 SE2d 437). The majority, however, chooses to ignore this guiding dicta.

Nevertheless, reference to such Supreme Court dicta is unnecessary to realize the error in the majority's reading of OCGA § 33-34-5 (c). It is an established rule of construction that courts should not interpret a statute so as to render parts of it surplusage or meaningless. *State of Ga. v. C.S.B.*, 250 Ga. 261 (297 SE2d 260) (1982); *Undercofler v. Colonial Pipeline Co.*, 114 Ga. App. 739 (152 SE2d 768) (1966). The majority finds subsection (c) applicable to all policies, no matter when they were issued, only by reading the statute's limiting term of "[o]n and after March 1, 1975" as "on *or* after March 1, 1975" and failing to read the word "existing" in conjunction with the limiting term "[o]n and after..." The majority's construction obviously renders the above limiting terms meaningless or surplusage. The correct, most reasonable, plain and ordinary meaning of the term "[o]n and after March 1, 1975," read with the word "existing", is that subsection (c) applies only to policies which were already in existence on the effective date of the statute. Had the legislature intended otherwise, it need not have provided any limiting terms at all in the statute.

It appears that with the majority opinion, this court comes full circle with regard to subsection (b) signature requirements imposed upon applications for automobile liability insurance. Originally, no one questioned the sufficiency of but one signature. *Jones v. State Farm Mut. Auto. Ins. Co.*, supra, first required multiple signatures – separate signatures for each optional coverage. Subsequently, in *Flewellen v. Atlanta Cas. Co.*, supra, the

Supreme Court found two signatures, one for optional PIP coverage and one for optional property damage, to satisfy subsection (b). And now in the instant case, the majority in effect abolishes any signature requirement, i.e., written rejection or acceptance of optional coverage, where the insurer has sent out a subsection (c) notice thirty days before any claim is made. This holding simply eviscerates subsection (b) and the Supreme Court's holding in *Flewellen v. Atlanta Cas. Co.*, supra.

I do not suggest that it is impossible to cure a defective, post March 1, 1975, application (and policy) by some mechanism less than a complete, new application. Such a curative mechanism, however, should comply with the subsection (b) writing requirements as delineated in *Flewellen v. Atlanta Cas. Co.*, supra.

In summary, holding that OCGA §33-34-5 (c) may be utilized as a curative mechanism for defective policies issued after the effective date of the statute defies the standard rules of construction, ignores the apparent legislative intent behind the statute, as well as the Supreme Court's intimations on the application of the subsection, and results in the utter circumvention of the Supreme Court's decision in *Flewellen v. Atlanta Cas. Co.*, supra. For those reasons, I dissent.

I am authorized to state that Chief Judge McMurray, Judge Banke and Judge Pope join in this dissent.

EXHIBIT 4

67288. INTERNATIONAL INDEMNITY COMPANY v. ODOM.

McMurray, Chief Judge.

On August 5, 1977, the International Indemnity Company (IIC) issued an automobile insurance policy to Tommy Lee Odom. Understanding the policy to provide only for $5,000 personal injury protection (PIP) benefits, on January 18, 1978, IIC, through its general agent, sent Odom a letter (pursuant to and in compliance with OCGA §33-34-5 (c) (formerly Code Ann. §56-3404b (c) prior to its amendment by Ga. L. 1982, p. 1234, which amendment is not applicable here) by first class mail and postage prepaid, advising him of optional no-fault PIP and vehicle damage coverage and the additional premiums necessary for such coverage. The letter did not contain any space for the insured's signature, but instead provided blocks to be checked. See *Wiard v. Phoenix Ins. Co.*, 251 Ga. 698 (310 SE2d 221). The letter indicated that a lack of response within 30 days would be considered a rejection of all of the optional coverages. Odom did not respond to the letter and asserted that it was never received. See *Stafford v. Allstate Ins. Co.*, 252 Ga. 38 (311 SE2d 437). On March 3, 1978, Odom was injured in an automobile accident and subsequently was paid $5,000 by the insurer of the host vehicle.

On or about January 11, 1982, Odom, through this attorney, requested payment of $45,000 additional PIP benefits from IIC and thereafter, on February 11, 1982, tendered to IIC the premiums due for such additional coverage. IIC claimed that Odom was not entitled to these additional PIP benefits and filed suit for declaratory relief. Odom responded and counterclaimed, seeking the additional PIP benefits, and bad faith and attorney fees. Both parties filed motions for summary judgement. The trial court granted summary judgement in favor of Odom and denied IIC's motion. The trial court, in its order, held that the insurance policy issued to Odom provided for $50,000 PIP benefits from

its inception because the application form did not contain the signature spaces for the applicant to accept or reject optional coverage as required by OCGA §33-34-5 (a), (b) (formerly Code Ann. §56-3404b (a), (b)) prior to its amendment by Ga. L. 1982, p. 1234, which amendment is not applicable here. The trial court did not, however, address whether IIC's letter of January 18, 1978, was effectual to constitute a rejection of the optional PIP coverage, and it expressly reserved for later determination the right to rule on the issue of damages, including statutory penalties and attorney fees. It is from that order that IIC appeals. *Held:*

The case sub judice is controlled by the decision in this court's whole court case of *Int. Indemnity Co. v. Enfinger,* 170 Ga. App. 443 (–SE2d–) and consequently the judgement of the trial court must be reversed.

Judgement reversed. Shulman, P.J., and Birdsong, J., concur.

DECIDED MARCH 8, 1984 –
REHEARING DENIED MARCH 21, 1984.

Action on policy. Fulton Superior Court. Before Judge Fryer.
Michael L. Wetzel, for appellant.
Robert P. Wildau, for appellee.

EXHIBIT 5

41070. ENFINGER v. INTERNATIONAL INDEMNITY COMPANY.

Gregory, Justice.

We granted certiorari to review the Court of Appeals' decision in *Enfinger v. Intl. Indem. Co.*, 170 Ga. App. 443 (–SE2d–) (1984). The issue for our determination is whether OCGA §33-34-5 (c) may be utilized to "cure" noncompliance with the signature requirements of OCGA §33-34-5 (b). We answer this question in the negative and reverse.

On August 26, 1980, appellant Enfinger applied for automobile liability insurance with appellee International Indemnity Company (IIC). It is undisputed that the policy application form executed by Enfinger did not comply with the signature requirements of OCGA § 33-34-5 (b). The policy issued to Enfinger provided the minimum $5,000 personal injury protection (PIP) coverage. IN an attempt to remedy its defective policy application, on September 22, 1980, IIC sent Enfinger a letter following the requirements of OCGA §33-34-5 (c), by first class mail and postage prepaid, advising him of optional PIP coverage and the additional premiums necessary for such coverage. This letter conformed to the standards for such letters set down in *Wiard v. Phoenix Ins. Co.*, 251 Ga. 698, 700 (310 SE2d 221) (1983). IIC received no response to this letter from Enfinger. On October 30, 1980, Enfinger was seriously injured in an automobile accident. IIC paid him the $5,000 basic PIP benefits under the policy.

In May 1982, Enfinger, through his wife, requested payment of $45,000 additional PIP benefits from IIC and tendered the required premiums. IIC denied the additional coverage and Enfinger commenced this action seeking the $45,000 additional PIP benefits, penalties and attorney fees based on the insurer's alleged bad faith refusal to pay the claim. The trial court ruled that the insurance policy issued to Enfinger provided for $50,000

PIP benefits from its inception because the IIC application form did not contain the signature spaces for the applicant to accept or reject optional coverage as required by OCGA §33-34-5 (b); that IIC's letter of September 22, 1980, was ineffectual to constitute a rejection of the optional coverage; and that Enfinger was not entitled to penalties and attorney fees because as a matter of law there had been no bad faith refusal to pay the claim. Both parties appealed.

The Court of Appeals reversed the trial court's ruling in a 5-4 decision and held OCGA § 33-34-5 (c) could be used to cure noncompliance with the signature requirements of OCGA §33-34-5 (b), therefore, Enfinger's failure to respond to IIC's letter of September 22, 1980, effectuated a rejection of any optional PIP coverage. We disagree.

A cardinal rule of statutory construction is that courts must look to the purpose and intent of the legislature and construe statutes so as to implement that intent. *Wilson v. Board of Regents,* 246 Ga. 649, 650 (272 SE2d 496) (1980). Therefore, we examine a portion of the history of our "no-fault" law and the decisions interpreting it to determine whether the legislature intended OCGA §33-34-5 (c) to apply to policies issued after the effective date of the statute. The original no-fault Act, Ga. Laws 1974, p. 113, required insurers to utilize forms for application for insurance which contained separate spaces for the insured to indicate acceptance or rejection of each of the optional coverages provided for in the Act. OCGA §33-34-5 (b). One of the required optional coverages was up to $50,000 personal injury protection. IN *Flewellen v. Atlanta Cas. Co.,* 250 Ga. 709 (300 SE2d 673) (1983), we held that a policy of insurance *issued after the effective date of the statute* provides for $50,000 PIP benefits, absent a signed rejection of the optional coverages by the insured. (Emphasis supplied.) See also, *GEICO v. Mooney,* 250 Ga. 760 (300 SE2d 799) (1983). However, the original Act failed to take into account policies which would be in existence on the effective date, March 1, 1975, since no application would be

submitted on these existing policies.[1] To alleviate this oversight, in 1975 the legislature amended the statute by adding OCGA §33-34-5 (c) which provides in pertinent part "On and after the effective date of this Act, all named insureds in existing motor vehicle liability policies who have not previously responded[2] to an offer to accept or reject the optional coverages required to be offered by this Act shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this Section..." We hold this section was intended to apply to policies in existence on March 1, 1975 and not those which came into existence after that date. This court recognized this was the intent of the 1975 amendment in *Wiard v. Phoenix Ins. Co.*, supra. IN *Stafford v. Allstate Ins. Co.*, 252 Ga. 38 (3) (310 SE2d 917) (1984), this court explained that "OCGA §33-34-5 (c) applies to policies in existence on March 1, 1975. OCGA § 33-34-5 (b) applies to applications for policies beginning March 1, 1975. Each category of policies is governed by the respective requirements of the statute."

The majority opinion in the Court of Appeals construed OCGA §33-34-5 (c) so as to apply to Enfinger since he had an "existing motor vehicle liability" policy "after March 1, 1975" and had "not previously responded to an offer to accept or reject the optional coverages required to be offered." While we agree the words of this section are susceptible to such a construction, we believe the legislature did not intend the section be given such a broad application. To hold otherwise would circumvent the signature requirements of OCGA §33-34-5 (b) and this court's decision in *Flewellen v. Atlanta Cas. Co.*, supra. We, therefore, reverse and remand for further disposition not inconsistent herewith.

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[1] In response to this circumstance, the insurance commissioner issued Rules and Regulations of Georgia Insurance Department, Chapter 120-2-28, pp. 351-354, which required a mailing to existing named insureds giving notice that $50,000 PIP coverage would be provided unless rejected.

[2] The legislature took into account that some insureds would have previously responded to the letter mailed out pursuant to the commissioner's regulation.

Judgement reversed and remanded. All the Justices concur, except Marshall, P.J., who concurs in the judgement only.

DECIDED JUNE 29, 1984 – REHEARING DENIED JULY 25, 1984.

Certiorari to the Court of Appeals of Georgia – 170 Ga. App. 443.

Kirbo & Conger, Ben Kirbo, for appellant.

Gurley & Fowler, Michael L. Wetzel, for appellee.

Robert M. Darroch, Richard T. Gieryn, Jr., amici curiae.

EXHIBIT 6

41049. ODOM v. INTERNATIONAL INDEMNITY COMPANY.

CLARKE, Justice.

This case is here on certiorari and involves use of OCGA § 33-34-5 (c) by insurers to correct any defects in automobile insurance applications for policies issued after March 1, 1975.

Odom's policy was issued in August of 1977 and provided for $5,000 personal injury protection. The trial court granted summary judgement for Odom on the issue of his entitlement to an additional $45,000 coverage because the policy application form did not comply with OCGA §33-34-5(b). See *Flewellen v. Atlanta Cas. Co.,* 250 Ga. 709 (300 SE2d 673) (1983). The Court of Appeals reversed based upon their opinion in *Enfinger v. Intl. Indem. Co.,* 170 Ga. App. 443 (–SE2d–) (1984), holding that a proper statutory reduction of benefits was made when Odom failed to respond to a letter mailed by the insurer on January 18, 1978, which complied with OCGA §33-34-5 (c). *Intl. Indem. Co. v. Odom,* 170 Ga. App. 447 (–SE2d–) (1984).

We granted certiorari and reversed the holding of the Court of Appeals in *Enfinger v. Intl. Indem. Co.,* 253 Ga. 185 (–SE2d–) (1984). Consequently, the judgement of the Court of Appeals in this case must be reversed and remanded for further proceedings consistent with the opinion of this court in *Enfinger,* supra.

Judgement reversed and remanded. All the Justices concur, except Marshall, P.J., who concurs in the judgement only.

DECIDED JULY 6, 1984–REHEARING DENIED JULY 30, 1984.

Certiorari to the Court of Appeals of Georgia–170 Ga. App. 447.

Tate, Mallernee & Wildau, Robert P. Wildau, for appellant.

Gurley & Fowler, Michael L. Wetzel, for appellee.

Robert M. Darroch, Richard T. Gieryn, Jr., amicus curiae.

Office-Supreme Court, U.S.
FILED
OCT 24 1984
ALEXANDER L. STEVAS,
CLERK

CASE NO. 84-429

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

JIMMY ENFINGER, BY AND THROUGH
HIS NEXT FRIEND, JOHNNIE ENFINGER,

Respondent

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

TOMMY LEE ODOM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS

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CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____ TERM

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

JIMMY ENFINGER, BY AND THROUGH
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Respondent

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

TOMMY LEE ODOM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Now come JIMMY ENFINGER and TOMMY LEE ODOM, Respondents in the above matter, and pursuant to this Court's Rule 34 submit

the following in response to International Indemnity Company's ("International") petition for writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

Because the questions for review as presented by International were not raised in the courts below, Respondents do not take exception with their statement by Petitioner but simply deny that any such issues are subject to review in this action.

LIST OF PARTIES

Respondents are satisfied with the list of parties as contained in International's petition.

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International Indemnity Company vs. Tommy Lee Odom, 253 Ga. 210 (____ SE2d _____), reversing 170 Ga. App. 447 (_____ SE2d _____).

JURISDICTIONAL GROUND

In accordance with Rule 34.2, Respondents have no response to International's statement of the grounds upon which it seeks to invoke this Court's jurisdiction, except to state that for the reasons as hereinafter set forth in the argument and citation of authority, this Court is without jurisdiction to grant a writ of certiorari in this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

In accordance with this Court's Rule 34.2, Respondents are unable to formulate any response to International's statement of the constitutional provisions involved in that by its petition for writ of certiorari International failed to set forth the constitutional provisions which the case alledgedly involves by either setting them out verbatim, giving appropriate citation therefor, or including the same in its appendix, all as required by this Court's Rule 21.1(f).

STATEMENT OF CASE

At its 1974 session, the Georgia Legislature enacted the Georgia Motor Vehicle Accident Reparations Act, commly known as Georgia's "no-fault" law [Ga. Laws 1974, pp. 113, et seq. (O.C.G.A. §33-34-1, et seq.; former Ga. Code Ann. §56-3401b, et seq.)], to become effective March 1, 1975. Under this Act each insurer was required to make available to each insured no-fault protection to the extent of at least $50,000. The Act provided that these limits could be rejected or reduced by the insured to not less than $5,000 only "by written consent of the policyholder" (O.C.G.A. §33-34-5(a)(1)).

The Act then went further to provide that the application blank for the policy "must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a)" O.C.G.A. §33-34-5(b).

The original Act failed, however, to take into account policies which would be in existence on its effective date, March 1, 1975. No application would be submitted for these policies because they would already be in existence. In order to cure this defect, the 1975 session of the Legislature amended the original Act (prior to its effective date) to add subsection (c) [O.C.G.A. §33-34-5(c)] which provided:

> "On and after the effective date of this Act, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this Act shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this section. Provided, however, that the failure of an insured to notify his insurer of his written acceptance or rejection within thirty days after written notice of the offer has been mailed by the insurer postage prepaid, by first class mail to the address stated in the policy, shall constitute a rejection of the optional coverage."

This amendment came into effect simultan-

eously (March 1, 1975) with the original Act.

As noted in International's application to this Court, although unsupported by evidence in the record, International was formed two years after the no-fault law had been enacted. In the subsequent course of its business, it issued to both Odom and Enfinger liability insurance policies containing no-fault coverage. The Odom policy was issued on August 5, 1977 based upon Odom's application of August 5, 1977 [See Addendum A hereto]. Enfinger's policy was issued on August 26, 1980 based upon an application of the same day. [See Addendum B hereto]

Neither of the applications upon which these policies were issued complied with the statutory mandate contained in O.C.G.A. §33-34-5(b) in that neither contained "separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages." Additionally,

the box on the Enfinger application for the rejection of the additional no-fault benefits was not marked by Enfinger in any manner.

Thereafter, on January 18, 1978 as to Odom, and on September 22, 1980 as to Enfinger, [Addendum C and D hereto] International allegedly forwarded to each insured a letter which it now contends was a "written offer of optional personal injury protection coverages as well as property damage coverages. . .to solicit the sale of additional amounts of coverage pursuant to O.C.G.A. §33-34-5(c)" [Petition, p. 8].

On October 22, 1980, some two years and nine months after the alleged letter to Odom and one month after the alleged letter to Enfinger, the Georgia Court of Appeals issued its decision in the case of Jones v. State Farm Mut. Auto Ins. Co., 156 Ga. App. 230 (274 SE2d 623) holding that the effect of the non-compliance of an insurer's

application with the statutory mandate of O.C.G.A. §33-34-5(b) by failing to provide separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section, was to leave open a "continuing offer" of the $50,000 mandatory coverage which the insured could accept even post-accident. Under this "continuing offer theory" according to the Jones Court, the insurer's defective application blank could be corrected by mailing to the insured an offer under O.C.G.A. §33-34-5(c), failure to respond to which would terminate the continuing offer, thus subsection (c) was construed as a "corrective mechanism".

This Jones rationale was subsequently followed by the United States District Court for the Northern District of Georgia in the cases of State Farm Mut. Auto. Ins. Co. v. Bates, [542 FSupp 807, June 30, 1982] and Shave v. Allstate Ins. Co.

[549 FSupp 1006, September 23, 1982].

After the issuance of their policies both Odom and Enfinger suffered serious injuries in automobile accidents thus bringing into play their respective no-fault coverages. Demand was made by each on International for $50,000 in no-fault benefits. In each case, International refused payment contending that its liability was limited to $5,000.

On March 16, 1982 (after Jones but before Bates and Shave) International instituted in the State courts a declaratory action against Odom seeking a declaration as to its non-liability for benefits in excess of $5,000, but making no mention either of any defense to liability under O.C.G.A. §33-34-5(c) nor of the constitutional issues which it now seeks to raise. Odom answered and filed his counterclaim for the $45,000 of additional benefits, statutory penalties and attorney's fees.

In August 1982 (after Jones, Bates and Shave), Enfinger filed his action against International seeking recovery of the additional $45,000 benefit together with certain statutory bad faith penalties and punitive damages. Within the thirty days provided by law, International filed its answer to Enfinger's complaint setting forth twelve separate defenses and one counterclaim for equitable reformation. None of these defenses made any contention that O.C.G.A. §33-34-5(c) had any application, nor raised any of the constitutional issues here raised.

On January 19, 1983, International filed its motion for summary judgment against Odom setting forth the some nine grounds of defense again making no mention whatsoever of any application of subsection (c) to that matter, and again silent as to the constitutional issue here.

On March 3, 1983, the Supreme Court

of the State of Georgia issued its ruling in Flewellen v. Atlanta Cas. Co., 250 Ga. 709 (300 SE2d 673) wherein it specifically rejected the "continuing offer theory" of Jones, supra, and held that the legal effect of the failure of an insurer to comply with the statutory mandate of O.C.G.A. §33-34-5(b) was that there was no written rejection of the optional coverage as required by subsection (a), thus resulting in an acceptance as a matter of law of the $50,000 PIP coverage:

> "The contract must be construed in light of the statute. The statute says that $50,000 PIP coverage is the least the insurer must offer. O.C.G.A. §33-34-5(a). The statute also says this offer of coverage may be refused only by a signed rejection in writing. O.C.G.A. §33-34-5(a) and (b) In the absence of such a rejection, the policy, therefore, provides $50,000 PIP coverage from its inception." p. 712 (Emphasis supplied)

Further, Flewellen addressed each and every issue which had been raised to that

point by International in both the Odom and the Enfinger litigation, in each instance contrary to International's position.

On March 15, 1983, Odom filed his response to International's motion for summary judgment. On that same day, International supplemented its motion for summary judgment raising for the first time in that case any contention that subsection (c) had any application to this matter and that Odom's coverage was limited to $5,000 because of his failure to respond to International's alleged letter of January 18, 1978, but again remaining silent as to the constitutional violations now complained of.

The next day, on March 16, 1983, the Supreme Court issued its ruling in GEICO v. Mooney, 250 Ga. 760 (300 SE2d 799), reiterating its Flewellen decision stating "[t]he absence of a written rejection will

be interpreted as an acceptance of the additional coverage. Flewellen, supra. This absence of written rejection or reduction of additional benefits as required by the statute is dispositive of the issue of coverage regardless of the presence or absence of signatures or the propriety of the form itself." p. 761

At pretrial conference on April 4, 1983, International amended its answer in Enfinger by adding an additional defense based upon its new subsection (c) contentions, but made no mention of any constitutional issues.

The trial court in both cases rejected International's subsection (c) defense, held that it did not constitute a rejection of the coverage, and each of the insureds was entitled to the full $50,000 coverage.

Both matters were then appealed by International to the Georgia Court of

Appeals. No constitutional issues were raised by it in either of these appeals.

On February 28, 1984, in a five-to-four decision, the Georgia Court of Appeals reversed the trial court in Enfinger, simply stating that it agreed with International that subsection (c) was applicable. The dissenting Justices vigorously disagreed with the majority on the basis of the Georgia Supreme Court's earlier decisions in Flewellen, supra, GEICO, supra, Wiard v. Phoenix Ins. Co., 251 Ga. 698, (____ SE2d _____), Stafford v. Allstate Ins. Co., 252 Ga. 38 (____ SE2d ____), and both the special concurring decision and dissenting decisions from an order of vacation of a writ of certiorari by the Supreme Court in Nalley v. Select Ins. Co., 165 Ga. App. 345, (___ SE2d _____) stating pointedly that subsection (c) had no application to post March 1, 1975 policies--all of which decisions had been ignored

by the majority.

On March 8, 1984, the Court of Appeals issued its decision in Odom reversing the trial court on the basis of its earlier decision in Enfinger.

The Georgia Supreme Court granted certiorari to review the Court of Appeals decision in both Enfinger and Odom, and after hearing argument on the two cases together on June 27, 1984, reversed the Court of Appeals decision in Enfinger on June 29, and in Odom on July 6. The basis of the Supreme Court's decision was its earlier holdings in Flewellen, supra, GEICO, supra, Wiard, supra, and Stafford, supra.

At no time either in the Georgia Court of Appeals or prior to judgment in the Georgia Supreme Court did International raise any of the constitutional issues set forth by it in its petition for writ of certiorari here.

After the Georgia Supreme Court's

decision in Enfinger and Odom, International filed its motion for rehearing, and for the first time sought to raise the equal protection issue specified by it as issue (A)1 here. See Addendum E attached. At no point has it ever raised at any level prior to its application for writ of certiorari to this Court the issues here specified by it as (A)2, (A)3, (A) 4, and (A)5. No ruling was made by the Georgia Supreme Court on the constitutional challenges enumerated in its motion for rehearing. See Addendum F and G hereto attached.

SUMMARY OF ARGUMENT

Respondents' argument in this matter is two-fold. First, Respondents argue that this Court lacks jurisdiction to issue a writ of certiorari here because of International's failure to raise in either the trial court or the appellate courts below the constitutional issues which it now seeks to have heard, all contrary to the mandate of 28 U.S.C. §1257(3), and to this Court's ruling in Webb v. Webb, 451 US 493, 68 LEd 2d 392, 101 SCt 1889 (1981). In the same vein, International's petition in this matter fails to comply with this Court's Rule 21.1(h).

Additionally, the facts in this matter as outlined in Respondents' statement of facts clearly show that International's failure to raise its constitutional issues at the appropriate time is not excused under either Cox Broadcasting Corp. v. Cohn, 420 US 469, 43 LEd 2d 328,

95 SCt 1029 (1975), nor under Missouri v. Gehner, 281 US 313, 74 LEd 870, 50 SCt 326 (1930) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 74 LEd 1107, 50 SCt 451 (1930), as contended by it.

The second part of Respondents' argument shows that this Court should not issue its writ of certiorari here because International's petition fails to show the existence of any important question of federal law which needs to be settled, or any decision of this Court with which the judgment complained of conflicts, all as required by this Court's Rule 21.1(j) and this Court's Rule 17.

ARGUMENT AND CITATON OF AUTHORITY

A. THIS COURT LACKS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT IN THIS MATTER.

Petitioner failed to timely raise its constitutional claims in the Courts below.

International seeks to invoke this Court's jurisdiction to grant a writ of certiorari under 28 U.S.C. §1257(3) [Petition, p. 6]. No such jurisdiction, however, is conferred under that statute because of International's failure to raise the constitutional issues below which it now seeks to raise here.

In Webb v. Webb, 451 U.S. 493, 68 LEd 2d 392, 396, 101 SCt 1889 (1981), one of this Court's latest pronouncements on the issue which, ironically, arises from a decision by the Georgia Supreme Court, you held:

> "Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 USC §1257 [28 USC §1257]. As applied to the circumstances of this case, that statute requires that in state courts petitioner have 'specially set up or claimed under the Constitution . . .of. . .the United States' that right which [it] now seeks to have this Court enforce. 28 USC §1257 (3) [28 USCS §1257(3)]. Similarly our Rule 21.1(h) requires the petitioner to 'specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court.'"

Compliance by the Petitioner here with these necessary prerequisites is utterly lacking.

As the Court will note in its petition, International failed to comply with this Court's Rule 21.1(h) both in specification as to the stage in the proceedings below wherein the question was raised, and in inclusion in its Appendix of such portion of the record which will reflect compliance

with this rule. The obvious reason for this failure is that International neither at the trial level, nor at the appellate level in the Georgia Court of Appeals, nor at the appellate level in the Georgia Supreme Court raised the issues which it now seeks to raise. Consequently, neither the trial court, nor the Georgia Court of Appeals, nor the Georgia Supreme Court passed upon any of these issues.

Petitioner's claim of exemption from the requirements of 28 USC 1257(3) is based on a distortion of the facts.

International seeks to escape the consequence of this fatal defect first by showing that "Petitioner's constitutional attack was raised in the motions for rehearing filed with the Georgia Supreme Court." It relys upon this Court's ruling the Cox Broadcasting Corp. v. Cohn, 420 US 469, 43 LEd 2d 328, 95 SCt 1029 that an issue is

properly preserved where it is raised for the first time on motion for rehearing and the Court rules thereon.

Petitioner's motion for rehearing in the Georgia Supreme Court in Enfinger is attached to this response as Addendum E, its motion in Odom being substantially identical. Plainly the equal protection claim specified as A(1) of its questions presented for review is the only constitutional issue mentioned in those motions. As further shown by the copy of the orders attached hereto as Addenda F and G denying the motions for rehearing in both cases, the Georgia Supreme Court made no ruling on this issue. Accordingly, Cox Broadcasting, supra, has no application here and offers International no exemption.

The remaining issues specified by International in its petition as questions (A)2, 3, 4, and 5 were raised by it for the first time in its petition for

certiorari. Accordingly, the carrier's only hope of obtaining a hearing on any of these claims is that it might somehow show that it was surprised by the decision sought to be reviewed, under the logic of Missouri v. Gehner, 281 US 313, 74 LEd 870, 50 SCt 326 (1930) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 74 LEd 1107, 50 SCt 451 (1930). It therefore tells this Court that:

> ". . .The ruling of the Georgia Supreme Court in the above referenced cases could not have been anticipated due to the body of law construing subsection (c) of O.C.G.A. §33-34-5, upon which the petitioner had relied, and which decisions the Georgia Supreme Court earlier had the opportunity to review and reverse but chose not to do so.", [Petition, p. 11] (Emphasis supplied)

The "body of law construing subsection (c)" to which Petitioner refers are those cases cited in its statement of the case [Petition, p. 8] as the grounds for its refusal to pay Respondents' claims in the

first place, to-wit: Jones v. State Farm Mut. Auto. Ins. Co., 156 Ga. App. 230 (274 SE2d 623) (1980), State Farm Mut. Auto. Ins. Co. v. Bates, 542 F.Supp. 807 (1982), Shave v. Allstate Ins. Co., 549 F.Supp. 1006 (1982), and Nalley v. Select Ins. Co., 165 Ga. App. 345 (1983).

But each of the cited cases had either been reversed, limited, or otherwise undermined well before Enfinger and Odom even went up to the Supreme Court of Georgia. First, Jones, supra, was overruled by the Georgia Court of Appeals in Flewellen v. Atlanta Cas. Co., 164 Ga. App. 865, (300 SE2d 166) (1982). When the Supreme Court of Georgia reversed Flewellen, supra, at 250 Ga. 709 (300 SE2d 673) (1983) it also exploded the "continuing offer" theory of Jones on which Bates, supra, and Shave, supra, had depended and replaced it with the concept that every no-fault policy carried the full quantum of optional benefits from

its inception as dictated by O.C.G.A. 33-34-5(a) unless the latter were properly rejected in writing in the manner prescribed by O.C.G.A. 33-34-5(b). While a footnote to a special concurrence in Nalley, supra, at 251 Ga. 723, concedes that "one possible construction of O.C.G.A. §33-34-5" is the one Petitioner favors, the later case of Stafford v. Allstate Ins. Co., 252 Ga. 38 (___SE2d ___) (1984) stated outright that "O.C.G.A. §33-34-5(c) applies to policies in existence on March 1, 1975. O.C.G.A. §33-34-5(b) applies to applications for policies beginning on March 1, 1975. Each category of policies is governed by the respective requirements of the statute." 252 Ga. at 40. (Parallel citations omitted). See also Waird v. Phoenix Ins. Co., 251 Ga. 698 (___SE2d___) (1983), outlining the legislative history of O.C.G.A. 33-34-5(c), and strongly intimating the restricted application of subsection (c) to pre-March

1, 1975 policies.

The decision of the Supreme Court of Georgia in the case at bar was amply foreshadowed by its prior rulings. International's claimed surprise, if taken as true, could only have resulted from a refusal to read the precedents cited by its opponents.

The suspect nature of Petitioner's claimed reliance on the "body of law construing subsection (c)" is highlighted by the fact that at page 8 of its petition it seems to be saying that it relied upon the same "body of law" in sending out its written offers of optional coverages to the Respondents herein. But the letter to Respondent Odom [Addendum C] was dated and allegedly mailed on January 18, 1978, some two years and nine months before Jones, the first of the cited decisions, was even issued. The letter to Mr. Enfinger [Addendum D] was dated September 22, 1980, still one month before Jones. Even then,

Bates v. State Farm, the next in the cited line of cases was still almost two years away.

In short, Petitioner's attempt to claim refuge in the unanticipated decision exception of Gehner, supra and Brinkerhoff-Faris, supra, is at best disingenuous, and should be rejected.

Finally, Respondents note that at no point in its petition does International offer any explanation for its failure to raise its constitutional challenges when it first appealed the matter from the trial level to the Georgia Court of Appeals. In each instance, the trial court's ruling was the same as that of the Georgia Supreme Court ruling here complained of, and the constitutional ramifications, if any, identical.

As was stated by this Court in Webb, supra:

"There are also very practical

reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness or overbreadth. This rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter."

International having failed to properly raise the constitutional issues which it now wishes for this Court to

decide, under this Court's earlier decision in Webb, supra, it is without jurisdiction in the matter and cannot issue any writ of certiorari to the Georgia Supreme Court.

B. INTERNATIONAL FAILED TO COMPLY WITH THIS COURT'S RULES 21.1(j) AND 17 IN THAT IT HAS FAILED TO SHOW ANY SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO REVIEW THIS MATTER ON WRIT OF CERTIORARI.

As to the lone constitutional issue mentioned by International in its motion for rehearing before the Georgia Supreme Court, (issue (A)1, petition pp. 1-2) it has failed to comply with this Court's Rule 21.1(j), as well as this Court's Rule 17. The only applicable portion of Rule 17 on considerations governing review of certiorari would be under 17.1(c) where a state court has decided an important question of federal law which should be settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court. Here, International has not shown in any fashion how either what important question of federal law needs to be settled, or any decision of this Court

with which the judgment complained of conflicts. Indeed, nowhere in its argument (Petition, pp. 11-14) does it address this issue in any fashion. Accordingly, there is nothing to which Respondents can respond.

CONCLUSION

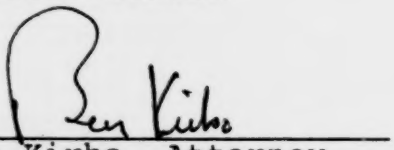
Petitioner International Indemnity Company has failed to specify, as required by this Court's rules, either how and when the issues which it seeks to have reviewed were raised and decided in the courts below or wherein this case is of sufficient importance to entitle it to review by certiorari. Ultimately, however, its petition must be denied precisely because the Court lacks jurisdiction to decide issues which were not first raised and decided below and no exception to this principle has been made out.

Accordingly, Respondents respectfully

request, and strenously urge this Court to deny International's petition for writ of certiorari and let the State court judgments be enforced immediately.

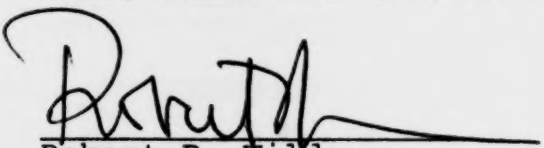
Respectfully submitted this 22d day of October, 1984.

KIRBO & CONGER

By: 

Ben Kirbo, Attorney
for Respondent
Enfinger

TATE, MALLERNEE & WILDAU

By: 

Robert P. Wildau,
Attorney for Respondent
Odom

EDITOR'S NOTE

PAGES ADD.A thru ADD. D WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Alexander Insurance

AUTOMOBILE APPLICATION

1 APPLICANT Tommy Lee Odom

ADDRESS 645 Chester St NE

OCCUPATION Crusher

EMPLOYER Marta

POLICY PERIOD FROM 8/5/77 TO 8/5/78

2 COVERAGES

	COVERAGES	LIMITS OF LIABILITY	CAR 1	THEFT
A	Bodily Injury Liability (including $5000 Basic PIP)	10 / 20 / 5 thousands	$ 310	$
B	Property Damage Liability	5 thousands	$ 10.00	$
C	Automobile Medical Payments	$	$	$
D	Comprehensive Loss of or Damage to the Automobile, except by Collision or Upset (not including Fire, Theft and Windstorm)	☐ No Ded ☐ $50 Ded ☐ $100 Ded Actual Cash Value less $	$	$
E	Collision or Upset	$	$	$
	Uninsured Motorists (A-66)	Thousands dollars each person / Thousands dollars each accident	$	$
	ADDITIONAL PIP	☐ $5,000 ☐ $20,000 ☐ $45,000	$	$
	LOSS OF USE	$10 per day $300 Maximum	$	$
	$ 310 TOTAL PREMIUM	TOTAL CAR 1 CAR 2 CAR 3	$ 320	$

3 Please File ☒ SR-22 ☐ SR-26 WE MUST HAVE CASE NO.

Filing on behalf of Hearing for filing

4 AUTOS

CAR	YEAR	TRADE NAME AND BODY TYPE	SERIAL NUMBER		HP			ITEMS
1	1966	Buick Electra 4Dr	494[illegible]H1[illegible]13			1	4	CV
2								
3								

LOSS PAYEE - NAME AND COMPLETE ADDRESS

1 AV-10-73-77

2

3

5 DRIVERS

DRIVER INFO (Complete for applicant, spouse and all persons over age 16 residing with applicant, licensed or not.) Any loss...

NAME OF PERSON EXACTLY AS SHOWN ON DRIVER'S LICENSE		SEX	MARITAL STATUS	AGE	YRS LICENSED	RELATION TO APPLICANT	DRIVER'S LICENSE NO.	STATE	ACCIDENTS
APPLICANT	M	M		16	12	SF	7837[illegible]	GA	[illegible]
NAME OF SPOUSE Susie Odom	F	M	Wife	5	23	Sp	6[illegible]5[illegible]5[illegible]4	GA	NIL

DRIVER	DATE OF BIRTH	LOCATION AND DETAILS OF ALL ACCIDENTS AND ALL VIOLATIONS DURING PREVIOUS 36 MONTHS	ACCIDENTS
Tommy Lee	12 20 [illegible]	DUI	

Is vehicle equipped or modified with special heads, two way telephone, oversized engine, lowered, high speed axle, or radio communication? ☒ No ☐ Yes

Is vehicle equipped with any of the following items: Magnesium or chrome wheels, tachometer or pressure gauges, modified or customized carburetor system, racing sheets, or customized body? ☐ No ☐ Yes

Has any driver been cancelled, rejected or refused for automobile insurance in the past three years? ☐ No ☐ Yes

Has applicant or any driver ever had disabling epileptic seizure or heart trouble? ☐ No ☐ Yes

Is vehicle used in business or occupation? ☐ No ☐ Yes

Does any driver have a physical impairment? ☐ No ☐ Yes

Is any operator of the vehicle(s) a member of the armed forces? ☐ No ☐ Yes

Is auto driven to work? ☐ No ☒ Yes Number of miles one way 3

Has any operator(s) of the vehicle been convicted of other than a motor vehicle violation? No

Describe any existing damage to vehicle(s) NONE

Name of previous insurance carrier UNKNOWN

Policy Number Expiration Date

ADDENDUM A, Pg. 1

List names and D O B of all persons REGARDLESS OF AGE

NAME	DOB

PRODUCER - NAME ADDRESS ZIP CODE

GEORGE H [illegible]

IN[illegible]

W[illegible]

R[illegible]

Atlanta, Ga.

IMPORTANT - ALL ITEMS SHOULD BE COMPLETED AND SIGNED

IMPORTANT READ BEFORE YOU SIGN!

PREMIUM FINANCE TERMS AND CONDITIONS

1 CASH PRICE	$
2 TOTAL CASH DOWN PAYMENT	
3 UNPAID BALANCE OF CASH PRICE (1 - 2) which is the AMOUNT FINANCED	
4 FINANCE CHARGE (Time price differential)	
5 TOTAL OF PAYMENTS (3 + 4)	
6 DEFERRED PAYMENT PRICE (1 + 4)	
7 ANNUAL PERCENTAGE RATE	

NOTICE TO BUYER 1 DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES 2 YOU ARE ENTITLED TO AN EXACT AND COMPLETELY FILLED IN COPY OF THE CONTRACT YOU SIGN 3 UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND TO OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE 4 A LATE CHARGE OR TIME PRICE DIFFERENTIAL

BUYER ACKNOWLEDGES RECEIPT OF AN EXACT AND COMPLETELY FILLED IN COPY OF THIS CONTRACT

IMPORTANT SEE OTHER SIDE FOR IMPORTANT INFORMATION

BUYER SIGNATURE

*GEORGIA NO-FAULT REJECTIONS

	Accepted	Rejected
FULL COLLISION COVERAGE	( )	( )
FULL COMPREHENSIVE COVERAGE	( )	( )
LOSS OF USE COVERAGE	( )	( )
UNINSURED MOTORIST COVERAGE	( )	( )
INCREASED LIMITS (50/100	( )	( )

IN LIEU OF THOUSANDS

10 25 50 NONE

ADDENDUM A,
Pg. 2

(GEORGIA) PLEASE TYPE OR PRINT

APPLICANT JIMMY ENFINGER (FIRST / MIDDLE / LAST) AGE ___ Home

ADDRESS Route 2, Box 2512, Bainbridge Georgia 31717 (Decatur County) PHONE 246-8893

(Lives at Melcher Lane, Bainbridge, Ga.) Work 246-2644

OCCUPATION Owner, Citizens Jr. Food Store EMPLOYER Self

Bainbridge, Ga.

POLICY PERIOD FROM (DATE) 8/26/80 11:00 A.M. TO 2/26/81 SIX MONTHS

2 COVERAGES	LIMITS OF LIABILITY	CAR 1 PREMIUMS	CAR 2	CAR 3
A Bodily Injury Liability including $5000 Basic PIP	$ 10 / 20 thousand dollars each person / thousand dollars each accident	$ 81.00	$	$
Property Damage Liability	5 thousand dollars each accident	$ INCL	$	$
Uninsured Medical Payments	$ each person	$	$	$
Comprehensive Loss of or Damage to the Insured Vehicle Caused by Collision or Upset Including Its Transportation Equipment	Actual Cash Value ☐ No ded ☐ $ 50 ded ☐ $100 ded; Stated Amount ☐ $150 ded ☐ $200 ded ☐ $250 ded	$	$	$
Collision or Upset	Actual Cash Value ☐ No ded ☐ $ 50 ded ☐ $100 ded; Stated Amount ☐ $150 ded ☐ $200 ded ☐ $250 ded	$	$	$
Uninsured Motorists	$ 10 / 20 thousand dollars each person / thousand dollars each accident	$ 8.00	$	$
PIP OPTIONAL PIP	☐ $5,000 ☐ $20,000 ☐ $45,000	$	$	$
Loss of Use	$ 0 per day $300 Maximum	$	$	$
	$	$	$	$
	TOTAL PREMIUM	TOTAL CAR 1-CAR 2-CAR 3 $ 89.00	$	$

3 ☐ FR 22 ☐ SR 22 ☐ SR 22a WE MUST HAVE CASE NO NONE Reason for filing

4 NONE

AUTOS	YEAR	TRADE NAME AND BODY TYPE	SERIAL NUMBER	COST NEW	CURRENT VALUE
	1953	Chevrolet 2Dr. Sed.	# B53F-099439		1A 02 19

LOSS PAYEE – NAME AND COMPLETE ADDRESS INCLUDING ZIP CODE

5 DRIVER INFO. Complete for applicant, spouse and all persons over age 14 residing in the applicant household whether or not a driver and all other relatives

DRIVERS	NAME OF PERSON EXACTLY AS SHOWN ON DRIVER'S LICENSE	SEX	MARITAL STATUS	RELATIONSHIP TO APPLICANT	DATE OF BIRTH	DRIVER'S LICENSE NUMBER	STATE	EXPIRATION DATE
	APPLICANT Enfinger, Jimmy E.	M	M	Self	12/11/41	Ga. #263:58 5182	Ga.	exp.83
	SPOUSE Johnnie P. Enfinger	F	M	Wife	12/4/43	Ga. 259 66 0667	Ga.	exp. 19

DRIVER	DATE	LOCATION AND DETAILS OF ALL ACCIDENTS AND ALL VIOLATIONS DURING PREVIOUS 36 MONTHS	AGE
		NONE	

Is vehicle equipped or modified with special heating, has any co-operator

Is vehicle equipped with any of the following items: Magnesium or

Has any co-operator been convicted, refused or refused bail

Has any co-operator had a license to drive

Has any driver ever had diabetes, an epileptic seizure or heart trouble?

Has any co-operator had

Has any co-operator had a permanent physical impairment?

Has any co-operator had a permanent loss of the use of a hand or foot?

Has any co-operator had

Has any co-operator had

Does any co-operator regularly drive

Name the insurance carrier

NEW BUSINESS

Explain any "YES" answers

REGARDLESS OF AGE

NAME

PRODUCER – NAME – ADDRESS / CODE

GRIFFIN REALTY & INSURANCE CO.
BOX 862
BAINBRIDGE, GA. 31717
Phone 1-912-246-4750

IMPORTANT: NEVER LEAVE BLANKS INCOMPLETE AND ANSWERS INCOMPLETE

ADDENDUM B, Pg. 1

IMPORTANT - READ BEFORE YOU SIGN

X Premium is NOT to be financed ☐ Premium IS to be financed Use Alexander Underwriters Plan

PREMIUM FINANCE TERMS AND CONDITIONS
MUST BE COMPLETED AND SIGNED

This agreement is subject to the policy applied for hereon and to the terms and conditions on the reverse hereof.

In consideration of the payment to the Insurance Company by Alexander Underwriters, Inc. of the amount financed, the insured promises to pay to Alexander Underwriters, Inc. the Total Contract Amount shown, subject to the following provisions.

Executed in duplicate this 26 day of August, 19 80

Buyer shall pay the total of payments in _____ consecutive monthly payments commencing on the _____ day of _____

and on the same day of each month thereafter, each payment to be in the amount of $ _____

1. CASH PRICE	$ 89.00
2. TOTAL CASH DOWN PAYMENT	89.00
3. UNPAID BALANCE OF CASH PRICE (1−2) which is the AMOUNT FINANCED	NONE
4. FINANCE CHARGE (Service charge or time price differential)	
5. TOTAL OF PAYMENTS (3 + 4)	
6. DEFERRED PAYMENT PRICE (1 + 4)	
7. ANNUAL PERCENTAGE RATE	%

In the event such payment becomes delinquent and such delinquency shall have continued for five days, the buyer agrees to pay a delinquency charge in an amount equal to the lesser of 5% of the delinquent payment, or $5.00, or such other maximum amount as may be provided by law, subject to a minimum of $1.50.

Alexander Underwriters, Inc. retains a purchase money security interest in the insurance applied for to secure the prompt performance of all of the buyer's obligations hereto.

In the event of prepayment or cancellation of the obligations or policies herein, buyer will receive a rebate of any unearned portion of the FINANCE CHARGE computed by the sum of the digits method, commonly known as the Rule of 78, except that an acquisition charge in the amount of $12.00. Where the rebate is less than $1.00 no refund will be given.

Buyer hereby irrevocably appoints Alexander Underwriters, Inc. Attorney-in-fact and gives authority to cancel the policies listed and receive all sums assigned in the event of any default by buyer of any term or condition herein.

In the event of default by buyer of any term or provision of this contract, Alexander Underwriters, Inc. may declare the entire unpaid balance, less any unearned portion of the service or FINANCE CHARGE, immediately due and payable upon ten (10) days written notice to the buyer. Cancellation to be short rate. Any unearned premium or service or FINANCE CHARGE shall be credited to any unpaid balance due hereunder and any excess over such unpaid balance shall be due to the buyer, provided the excess exceeds $1.00. The buyer remains liable to Alexander Underwriters, Inc. for any deficiency over $1.00.

NOTICE TO BUYER: 1. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES. 2. YOU ARE ENTITLED TO AN EXACT AND COMPLETELY FILLED IN COPY OF THE CONTRACT YOU SIGN. 3. UNDER THE LAW YOU HAVE THE RIGHT TO PAY OFF IN ADVANCE THE FULL AMOUNT DUE AND TO OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE, SERVICE CHARGE OR TIME PRICE DIFFERENTIAL.

BUYER HEREBY ACKNOWLEDGES RECEIPT OF AN EXACT AND COMPLETELY FILLED IN COPY OF THIS CONTRACT.

IMPORTANT - SEE OTHER SIDE FOR IMPORTANT INFORMATION

8/26/80 _____
(BUYER'S SIGNATURE)
Jimmy Enfinger

*GEORGIA NO-FAULT REJECTIONS
INCLUDING UNINSURED MOTORISTS

Limits for Uninsured Motorist Bodily Injury Protection and Property Damage options. Additional amounts include the basic $5,000.

(VEHICLE OF E					Accepted	Rejected
THOUSANDS				FULL COLLISION COVERAGE	☐	✓
				FULL COMPREHENSIVE COVERAGE	☐	✓
				LOSS OF USE COVERAGE	☐	✓
10	25	50	NONE	UNINSURED MOTORIST COVERAGE	☑	☐

As per [illegible] insurance agent may be present at the time of the original application or prior to any renewal thereafter and shall [illegible] the insurance agent with the option of rejection (exclusion of coverage) and shall so inform, upon written request, additional information [illegible] the option of rejection of the coverage, if any is made, and for (rejection).

[illegible] ADDENDUM B,
Pg. 2

Jimmy Enfinger 8/26/80 [illegible] A.M. P.M.

TEXAS UNDERWRITERS, INC
P. O. BOX 4A5
ATLANTA, GEORGIA 30302

January 18, 1978

Tommy Lee Odom
690 Oliver St., N. W.
Atlanta, GA 30318

Re: International Indemnity Company
Auto Policy Number AU 107397

Thank you for purchasing auto insurance from us. We are offering you an additional opportunity to accept or reject the following optional coverages:

(A) Personal Injury Protection - No Fault Options

You have purchased $5,000. basic coverage. You may purchase:

☐ 10,000. for an additional premium of $60. annually per car

☐ 25,000. for an additional premium of $90. annually per car

☐ 50,000 for an additional premium of $150. annually per car

(B) Physical Damage Options

☐ If you purchased collision and comprehensive coverages, the deductible can be eliminated for an additional annual premium of $250. per car

☐ Loss of use coverage may be purchased for $25. per car per year

If you want to purchase any of the optional coverages, simply mark the box and return this letter to us with your check for the additional premium. Your lack of response within thirty (30) days means you have rejected all the above optional coverages.

Brenda Hall

Personal Lines Department

ADDENDUM C

ATLANTA, GEORGIA 30348

ember 22, 1980

[illegible]
[illegible] Box 2512
Bainbridge, GA 31717

[illegible] International Indemnity Company
Auto Policy Number AU 742294

[illegible] you for purchasing auto insurance from us. We are offering you [illegible]dditional opportunity to accept or reject the following optional [illegible]verages:

(A) Personal Injury Protection - No Fault Options

You have purchased $5,000. basic coverage. You may purchase

☐ 10,000. for an additional premium of $60. annually per [illegible]

☐ 25,000. for an additional premium of $90. annually per car

☐ 50,000. for an additional premium of $150. annually per ca.

B) Physical Damage Options

☐ If you purchased collision and comprehensive coverages, the deductible can be eliminated for an additional annual premium of $250. per car

☐ Loss of use coverage may be purchased for $25. per car per year

[illegible] you want to purchase any of the optional coverages, simply mark the [illegible] and return this letter to us with your check for the additional [illegible]emium. Your lack of response within thirty (30) days means you [illegible]ve rejected all the above optional coverages.

Brenda Dell

[illegible]rsonal Lines Department

ADDENDUM D

IN THE SUPREME COURT
FOR THE STATE OF GEORGIA

JIMMY ENFINGER by and through his next friend, JOHNNIE ENFINGER,	:	
Appellant	:	
vs.	:	CASE NO. 41070
INTERNATIONAL INDEMNITY COMPANY,	:	
Appellee	:	

MOTION FOR REHEARING

Comes now the appellee in the above-styled case and applies to this Court for a rehearing of its decision rendered therein on June 29, 1984. A copy of this Court's decision in Enfinger v. International Indemnity Company _____ Ga. _____ (June 29, 1984, Case No. 41070) is attached hereto and incorporated herein as Exhibit 1.

On June 29, 1984, this Court affirmed divisions 1 and 3 of the Court of Appeals' decision rendered in this case, holding that International Indemnity Company's application was deficient under the standards required by O.C.G.A. Sec. 33-34-5 (b) and that the trial court correctly dismissed Enfinger's claim for attorney's fees, penalty and punitive damages. This Court further ruled that subsection (c) of O.C.G.A. 33-34-5 does not apply to policies issued after March 1, 1975 and that the subsection, in any event, is not a curative mechanism for policies of insurance issued on defective applications.

In rendering that decision, order or judgment, this Court committed the following errors or overlooked pertinent statutes, decisions or facts calling for a decision different from that which was rendered.

I.

THERE IS NO RATIONAL RELATIONSHIP IN TREATING DIFFERENTLY INSURERS ISSUING (AND HOLDERS OF POLICIES ISSUED) BEFORE AND EXISTING ON MARCH 1, 1975 AND THOSE HAVING POLICIES OF INSURANCE ISSUED AFTER MARCH 1, 1975. TO SO HOLD DEPRIVES INTERNATIONAL INDEMNITY COMPANY OF THE RIGHT TO THE EQUAL PROTECTION OF THE LAWS UNDER THE CONSTITUTIONS

OF THE UNITED STATES AND OF THE STATE OF GEORGIA.

This Court erred in its decision of June 29, 1984, and to uphold said error would deprive International Indemnity of its right to equal protection under law by said holding: ... [T]his section [O.C.G.A. Sec. 33-34-5 (c)] was intended to apply to policies in existence on March 1, 1975 and not those which came into existence after that date." Slip Opinion, p. 3.

The error in this Court's reasoning is illustrated as follows. Policyholders owning policies of insurance issued before March 1, 1975 could have their PIP coverages reduced from $50,000.00 (which seemingly would be imposed automatically at the inception of the Act by Flewellen v. Atlanta Cas. Co. 250 Ga. 709 [1983]) to $5,000.00 by failing to respond to a mailed offer sent pursuant to O.C.G.A. 33-34-5 (c). Actual receipt would be unnecessary nor would actual signatures; blocks requiring a checkmark would be sufficient. Indeed, for those owning a policy at the inception of the Act, this Court has refused to impose the additional coverage without a conscious choice. Stafford v. Allstate Ins. Co. 252 Ga. 38 (1984). (Stafford and Flewellen seem to be in direct conflict).

By contrast, one purchasing a policy of insurance after March 1, 1975 can reject or reduce PIP coverages only in writing on a multiple signature application. Flewellen v. Atlanta Cas. Co. 250 Ga. 709 (1983). If the application had insufficient signature spaces, albeit the insured had been informed of the optional coverages available and intended to reject them, the insured would have the optional additional insurance coverages imposed without a conscious choice. Compare Flewellen v. Atlanta Cas. Co., supra with Stafford v. Allstate Ins. Co. supra.

This disparity discriminates against insurers in that, while the optional coverages may be automatically imposed, the insurer cannot unilaterally increase the premium representative of the increased coverage without the insured's consent. See Howard v. American Southern Ins. Co. 148 Ga. App. 25 (1978). There is no

rational relationship between treating differently these classes of insurers and insureds (pre Act and post March 1, 1975) in order to assure the offer of optional PIP required by O.C.G.A. 33-34-5. As indicated by Flewellen, supra, the purpose of the Act is to assure that each insured is offered optional PIP and has a knowing opportunity to accept or reject same. When an insured is applying for insurance, he has no coverage. Once a policy is issued, whether it has $5,000.00 in PIP or $50,000.00 in PIP, the public policy of the State has been satisfied. Following issuance of the policy, the burden shifts to the insured to affirmatively choose - by way of a conscious choice - optional PIP. Stafford v. Allstate Ins. Co. Subsection (c) provides that opportunity.

The formality and strictness with which subsection (b) is scrutinized, in furtherance of the public policy to assure at least minimum insurance coverage is carried by every motorist, is justifiably liberalized when the decision is presented as to whether or not to purchase the additional coverage in that the insured already carries the mandatory coverages. This Court's decision of June 29 does a disservice both to insureds and insurers as it deprives both of the right to make contracts based upon a conscious choice.

II.

THIS COURT ERRED IN HOLDING THAT THE LANGUAGE OF O.C.G.A. 33-34-5 (c) APPLIES ONLY TO POLICIES IN EXISTENCE ON MARCH 1, 1975 AND NOT THOSE WHICH CAME INTO EXISTENCE AFTER THAT DATE.

The pertinent part of O.C.G.A. Sec. 33-34-5 (c) provides: "On and after March 1, 1975, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this act shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this section...."

This Court held: "... [T]his Section was intended to apply to policies in existence on March 1, 1975 and not those which came into existence after that date."

The Court of Appeals in its decision of February 28, 1984 held that, on September 22, 1980 Mr. Enfinger had an "existing motor vehicle liability policy" after March 1, 1975 (in that it had been issued on August 26, 1980) and "had not previously responded to an offer to accept or reject the optional coverages required to be offered." The reason for that was that policy had been issued on a deficient application. Consequently, the Court of Appeals ruled that subsection (c) applied to Enfinger. This Court agreed that the words of the section are "susceptible to such a construction" but did not believe the legislature intended the section to be given such a broad application. Slip Opinion pp. 3-4.

As initially enacted, the Georgia Motor Vehicle Accident Reparations Act would have imposed $50,000.00 in PIP benefits on each policy from its inception, subject to "rejection or reduction" by an application for a policy of motor vehicle liability insurance. Georgia Laws 1974, pp. 17-18. The 1975 Georgia General Assembly amended the statute by adding subsections (c) and (d) to provide: "[o]n and after the effective date of this Act, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this section shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this section. **** (The unofficial Georgia Code Ann. began subsection (c) as stating "On and after the effective date of this amendment ...." The 1982 Official Code of Georgia Annotated, Sec. 33-34-5 [c], began, "On and after March 1, 1975 ....")

Contrary to this Court's interpretation in Enfinger, that "the original act failed to take into account policies which would be in existence on the effective date, March 1, 1975 ...," the legislature sought to allow insurers to require insureds to pay for additional coverages chosen or imposed, beginning from the date of the inception of the no-fault act and thereafter. Thus, those policies of insurance which were existing "on and after March 1, 1975" (which

would include policies issued before, existing on and issued after March 1, 1975) were included. In those situations where a person had an existing policy of insurance on March 1, 1975 as well as those owning policies issued on defective applications after March 1, 1975, the entire class of "all named insureds in existing motor vehicles liability policies who have not previously responded" to the offer would be included.

The "on and after March 1, 1975" language is an expansion of the class, rather than a reduction to those only owning policies issued before and existing on March 1, 1975. See Shave v. Allstate Ins. Co. 549 F Supp. 1006 (SD Ga. 1982); State Farm Mut. Auto. Ins. Co. v. Bates 542 F Supp. 807 (ND Ga. 1982); Jones v. State Farm Mut. Auto Ins. Co. 156 Ga. App. 230 (1980).

Moreover, in Stafford v. Allstate Ins. Co., this Court correctly declared that subsection (c) applies to policies in existence on March 1, 1975 while subsection (b) applies to applications for policies beginning on March 1, 1975. Certainly, each category of policies is governed by the respective requirements of the statute, in that applications could not offer coverages (before March 1, 1975) which were not yet in existence. Hence, applications used prior to March 1, 1975 need not offer no-fault benefits at all. After March 1, 1975, such offerings became mandatory; however, an insurer not complying with subsection (b) would automatically issue policies containing $50,000.00 in PIP coverage, subject to whether the insured wished to pay the premium. Plewellen v. Atlanta Cas. Co., supra. One manner to determine whether or not that purchase was desired - indeed, the only way once a policy was "existing" - was to obtain a "conscious choice" by way of a subsection (c) offer. There is no limiting language under subsection (c) that says the mailed offers could not be used subsequent to March 1, 1975. To hold otherwise is simply an egregious error.

Moreover, the interpretation by this court nullifies subsection (d) of O.C.G.A. 33-34-5. It was enacted at the same time

as (c), by the same Amendment (Ga. L 1975, pp. 3-4), and should apply to the same time frame. Yet policies lapsing or cancelled before March 1, 1975 would not be affected; only those existing on and issued after March 1, 1975. Thus the "on and after March 1, 1975" phrase means those policies existing on and after that date, including those issued after March 1, 1975.

Finally, this Court should note that originally subsection (d) applied only to renewals, which contemplates reissuance of a policy for an additional period by the same insurer. By amendment (Ga. L 1982, p. 1234), subsection (d) applies also to renewals, replacements, reinstatements as well as to conduct contemplated by other insurers than the one originally making the offer of optional PIP - transfers or substitutions of policies.

III.

THIS COURT ERRED IN DECLARING THAT ALL POLICIES OF INSURANCE ISSUED AFTER MARCH 1, 1975 PROVIDE FOR $50,000.00 PIP BENEFITS, ABSENT A SIGNED REJECTION OF THE OPTIONAL COVERAGES BY THE INSURED.

At pages 2 and 3 of its decision, this Court declared that Flewellen provides that a policy of insurance issued after the effective date of the statute (Sec. 33-34-5) provides for $50,000.00 PIP benefits, absent a signed rejection of the optional coverages by the insured. Flewellen applied to a subsection (b) application, requiring multiple signatures, one for optional PIP and one for all other coverages. However, this Court had the opportunity to review a situation where a person was issued a policy of insurance on a defective application, after March 1, 1975, later signed a supplemental application containing a single signature and was effectively held to have rejected the optional PIP. Malley v. Select Ins. Co. 165 Ga. App. 365 (1983) In that case, this Court withdrew the Writ of Certiorari, 251 Ga. 722, and placed its imprimatur on a post March 1, 1975 policy of insurance which was reduced to $5,000.00 in PIP without the necessity of a multiple signature application. Thus where there is an existing policy, the

multiple signature requirement is not necessary to reject optional PIP. The insured must affirmatively "opt in" for the additional coverages. Cf Jacobson v. Illinois Farmers Ins. Co., 264 NW 2d 804 (Minn 1978)

The trial court ruled in this case that IIC's subsection (c) notice attempt was "ineffectual to constitute a rejection from the inception of the policy." The appellee has not argued that there was a rejection from the inception. If no proper offer ever had been made, no issue of rejection could have been raised. Furthermore, it is undisputed that the policy of insurance was issued on a defective application in August, 1980, which then was followed by the proper offer of optional PIP on September 26, 1980. Slip Opinion, p. 1. The failure to respond within 30 days constituted a rejection. There is no argument that the rejection occurred from the date of the inception, only from the date of the offer. Compare International Indemnity Company vs. Lott ____ Ga. App. _____ (1984), Certiorari granted (Case No. _____); IIC v. Woods 169 Ga. App. 830 (1984), Certiorari denied and First of Georgia Underwriters Co. v. Beck 169 Ga. App. _____ (1984), Certiorari denied.

Other Courts have recognized this theory, as has this Court in Nalley, 251 Ga. 722, and it should be equally applied to this case. See Koenig v. Mission Ins. Co. 471 P2nd 271 (Ariz 1970); Manchester Ins. & Indemnity Co. v. Jones 317 SO 2nd 786 (FL 3rd DCA 1975); International Ins. Co. vs. Maseur 404 So. 2nd 1313 (La App. 1981); Jordan v. Honea 407 So. 2nd 503 (La App. 1981).

IV

THE DECISION IN THIS CASE SHOULD HAVE PROSPECTIVE APPLICATION ONLY BECAUSE IT ESTABLISHES A NEW PRINCIPLE OF LAW, IN ORDER TO FURTHER ITS PURPOSE AND EFFECT, AND IN LIGHT OF THE EQUITIES INVOLVED.

If this Court refuses to reverse itself and stands by its decision of June 29, 1984, it should apply prospectively only.

In Flewellen v. Atlanta Casualty Co., 250 Ga at 713-715, this Court was faced with whether to apply its decision prospectively only.

In deciding that Flewellen would be applied from the inception of the no-fault act, the test as set forth in Chevron Oil v. Huson 404 U.S. 97, 92 SCt 349, 30 LEd 2nd 296 (1971) was used. Accord, Northern Pipeline Construction Co. v. Marathon Pipe Line Co. 458 US 50, 102 S. Ct. 2858 (1982). That same standard should be applied in this case, as a consequence of which this case must have prospective application only.

Of the three factors, the first considers whether the decision to be applied nonretroactively establishes a new principle of law, either by overruling past precedent on which litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. (Northern Pipeline, supra, which addressed the "unprecedented question of interpretation of Article III," refused to apply its decision retroactively.)

Flewellen declared that the mandate of subsection (b) was clear; however, this court admitted "its interpretation was obviously less so." Cotton States Mut. Ins. Co. v. McFather, 251 Ga. 739, 743 (1983). Contrariwise, subsection (c) has a multitude of conflicting decision interpreting it. Malley v. Select Ins. Co. 165 Ga. App. 345 (1983); State Farm Mut. Auto. Ins. Co. v. Bates, supra; Shave v. Allstate Ins. Co., supra; Jones v. State Farm Mut. Auto. Ins. Co. supra; and Flewellen v. Atlanta Cas. Co. 250 Ga at 714. However, whether or not to apply that statute to policies issued after the inception of the No-Fault Act, and whether it is a curative mechanism constitute first impression issues for the Courts of Georgia. Consequently, Chevron factor one indicates that this case should be applied prospectively only. Accord Northern Pipeline Construction Co. v. Marathon Pipe Line Co., supra. Additionally, it seems to overrule past precedent sub silentio in that Malley v. Select Ins. Co. applied to policies of insurance issued after the inception of the no-fault act (November, 1976) and a supplemental application taken after that time. (August 23, 1977). Additionally, the Bates and Shave decisions by the federal district courts in Georgia would have applied

subsection (c) to all policies as a corrective mechanism, as would have Jones v. State Farm and the Court of Appeals decision in this case. (Indeed, the curative features of subsections [c] and [d] is what allowed the statute to pars constitutional scrutiny. Bates, supra).

Secondly, the balance of the merits and demerits in this case after looking to the prior history of the rule in question, its purpose and effect, shows that a prospective operation would further its operation, while a retrospective operation would retard its operation.

In Flewellen, the major concern was that insurers offer optional coverages to applicants for no-fault insurance and that an applicant's waiver of his privilege to obtain optional coverages be made knowingly and in writing. The Court held in this case that the offer was sufficient and met the standards set forth in Wiard v. Phoenix Ins. Co., but that the provisions of subsections (c) do not apply. However, it was this case that determined that very issue. There is nothing in a retrospective operation that would further the purposes of the Act. Contrary to the insurer's conduct in the Flewellen decision, an analysis of the efforts utilized by International Indemnity Company shows a conformance with the statutory scheme, even though this Court has now ruled that subsection (c) does not apply to the time frame in question. Thus, the decision in this case should be guidance for the future, rather than punishment for an erroneous interpretation of which this court agreed the statute was "susceptible." Therefore, even though this court disagrees with that interpretation, until June 29, 1984 there was a reasonable basis for believing that IIC's interpretation was correct. Nalley v. Select Ins. Co., supra; Wiard v. Phoenix Ins. Co., 167 Ga. App. 49 (1983) (no reference to date when policy was issued or any limitation on O.C.G.A. 33-35-5 [c]); Shave v. Allstate Ins. Co., supra and State Farm Mut. Auto. Ins. Co. v. Bates, supra (subsection c is a corrective mechanism for all policies).

In weighing the equities imposed by retroactive application, as required by the third Chevron factor, substantial inequitable results will occur if this Court's decision is applied retroactively. Contrary to the situation in Flewellen, the mandate of the law under subsection (c) is not clear. Rather, other courts have held that subsection (c) applies to policies of insurance issued after March 1, 1975 as a corrective mechanism for insureds who have not previously responded to an offer to accept or reject the optional coverages required to be offered. This Court expressly agreed that the words of this section are susceptible to such a construction. Slip Opinion p. 3 Accord, Nalley v. Select Ins. Co. 251 Ga. 722, Note 1. Accordingly, to apply this Court's decision retroactively would produce unjust results for those parties who justifiably relied upon past precedent. Cf Walker v. Walker 247 Ga. 502 (1981); Strickland v. Newton Co. 244 Ga. 54 (1979); Adams v. Adams 249 Ga. 477 (1982) Walker v. Walker 247 Ga. 503 (1981); Allan v. Allan 236 Ga. 199 (1976); Finance America Corp. v. Drake 154 Ga. App. 811 (1980); Gainesville Financial Services, Inc. v. McDougal 154 Ga. App. 820 (1980). Accord, Northern Pipeline Construction Co. v. Marathon Pipe Line Co.

Furthermore, as raised by IIC's Twelth Affirmative Defense, to apply "Jones v. State Farm" retroactively would deprive IIC of the due process of law. The existence of subsections (c) and (d) as a curative mechanism for all insurance policies is what allowed Sec. 33-34-5 to pass constitutional scrutiny. State Farm Mut. Auto. Ins. Co. v. Bates, supra; Flewellen, 250 Ga. at 714. A fortiori, to rule that those subsections are not corrective mechanisms for all policies, and then impose that ruling retroactively, would compel a federal court to declare unconstitutional O.C.G.A. 33-34-5.

V.

THIS COURT SHOULD DECLARE THAT, AS A MATTER OF LAW, THERE IS NO BAD FAITH IN THIS CASE.

This Court did not address the issue of bad faith in its decision, but, rather, reversed and remanded this case "for further

disposition not inconsistent herewith."

The most logical interpretation of this Court's opinion is that divisions one and three of the Court of Appeals decision was affirmed, while division two was reversed and remanded for further consideration. However, this Court is asked to issue a clear and unequivocal pronouncement that this case, like the "circumstances" of Geico v. Mooney 250 Ga. 760, 763 (1983); accord Cotton States Ins. Co. v. McPather 251 Ga. 739, 743 (1983), presents no room for bad faith as a matter of law.

Clearly, this case was litigated while the law was in a state of flux and, in fact, is the very case where the question is raised and reversed on appeal. Flewellen v. Atlanta Cas. Co., supra Cf Geico v. Mooney, 250 Ga 760, 763 (1983). Indeed, the appellee herein relied upon the gloss placed on subsection (c) of O.C.G.A. 33-34-5 by appellate courts of this state and lower level U.S. District Courts sitting in Georgia. Interstate Life Ins. Co. vs. Reevis 156 Ga. App. 204 (1980). Therefore, this appellee prays that this Court will eliminate the issue of bad faith as a matter of law.

SUMMARY AND CONCLUSION

Appellee prays for a rehearing on the basis that this Court erred or misconstrued governing authorities by holding that the "on and after March 1, 1975" language of O.C.G.A. 33-34-5 (c) applies only to those policies issued before and existing on March 1, 1975. Conversely, if subsection (c) applies only to those policies issued before and existing on March 1, 1975, that statute is unconstitutional for depriving this appellee of the equal protection of law as guaranteed by the constitutions of the United States of America and the State of Georgia.

Rehearing should be granted, and the decision by this Court reversed on the basis of the erroneous holding that all policies issued after March 1, 1975 require rejection of optional PIP in writing on an application, otherwise there will be $50,000.00 imposed from the inception which cannot be reduced except by way of another

multiple signature application. To hold otherwise overlooks Malley v. Select Ins. Co. 165 Ga. App. 345 (1983) and well reasoned authority from sister states.

Should this Court refuse to grant a rehearing and to reverse its earlier decision, that decision issued June 29, 1984 should be applied prospectively only for the reason that it established a new principle of law that overrules past precedent and procures a result that was not reasonably forseeable. A prospective application would further the statute's operation, and the inequities imposed by retroactive application of this Court's decision would produce substantial inequitable results. To apply said decision retrospectively deprives International Indemnity Company of property without due process of law.

Respectfully submitted,

GURLEY & FOWLER, P.C.

By: Michael L. Wetzel

P.O. Drawer 29825
Atlanta, Georgia 30359
(404) 636-1403

41070

SUPREME COURT OF GEORGIA

ATLANTA, July 25, 1984

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JIMMY ENFINGER, b/n/f v. INTERNATIONAL INDEMNITY COMPANY

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/Joline B. Williams Clerk.

ADDENDUM F

BEST AVAILABLE COPY

41049

SUPREME COURT OF GEORGIA

ATLANTA, July 30, 1984

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

TOMMY LEE ODOM V. INTERNATIONAL INDEMNITY COMPANY

Upon consideration of the Motion for Rehearing filed in this case, it is ordered that it be hereby denied. All the Justices concur.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/Joline B. Williams, Clerk.

ADDENDUM G

BEST AVAILABLE COPY

CERTIFICATE OF SERVICE

GEORGIA, DECATUR COUNTY.

We do hereby certify that we have this day served a copy of the within and foregoing Response together with Addendum attached thereto upon International Indemnity Company, Petitioner, by depositing two copies of the same in the United States Mail in an envelope properly addressed with sufficient postage affixed thereto to assure the transmittal thereof to its attorney of record, to-wit:

Mr. Michael L. Wetzel
GURLEY & FOWLER, P.C.
P. O. Drawer 29825
Atlanta, Georgia 30359.

This 22nd day of October, 1984.

KIRBO & CONGER

By: Ben Kirbo
Ben Kirbo, Attorney for
Respondent Enfinger

TATE, MALLERNEE & WILDAU

By: Robert P. Wildau
Robert P. Wildau, Attorney
for Respondent Odom

Supreme Court, U.S.
FILED
OCT 24 1984
ALEXANDER L. STEVAS
CLERK

CASE NO. 84-429

IN THE SUPREME COURT OF THE UNITED STATES

_____TERM

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

JIMMY ENFINGER, BY AND THROUGH
HIS NEXT FRIEND, JOHNNIE ENFINGER,

Respondent

INTERNATIONAL INDEMNITY COMPANY,

Applicant for Certiorari

versus

TOMMY LEE ODOM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

BRIEF FOR RESPONDENTS

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TOMMY LEE ODOM,

Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF GEORGIA

RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

Now come JIMMY ENFINGER and TOMMY LEE ODOM, Respondents in the above matter, and pursuant to this Court's Rule 34 submit

the following in response to International Indemnity Company's ("International") petition for writ of certiorari.

QUESTIONS PRESENTED FOR REVIEW

Because the questions for review as presented by International were not raised in the courts below, Respondents do not take exception with their statement by Petitioner but simply deny that any such issues are subject to review in this action.

LIST OF PARTIES

Respondents are satisfied with the list of parties as contained in International's petition.

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International Indemnity Company vs. Tommy Lee Odom, 253 Ga. 210 (____ SE2d _____), reversing 170 Ga. App. 447 (_____ SE2d _____).

JURISDICTIONAL GROUND

In accordance with Rule 34.2, Respondents have no response to International's statement of the grounds upon which it seeks to invoke this Court's jurisdiction, except to state that for the reasons as hereinafter set forth in the argument and citation of authority, this Court is without jurisdiction to grant a writ of certiorari in this matter.

CONSTITUTIONAL PROVISIONS INVOLVED

In accordance with this Court's Rule 34.2, Respondents are unable to formulate any response to International's statement of the constitutional provisions involved in that by its petition for writ of certiorari International failed to set forth the constitutional provisions which the case alledgedly involves by either setting them out verbatim, giving appropriate citation therefor, or including the same in its appendix, all as required by this Court's Rule 21.1(f).

STATEMENT OF CASE

At its 1974 session, the Georgia Legislature enacted the Georgia Motor Vehicle Accident Reparations Act, commly known as Georgia's "no-fault" law [Ga. Laws 1974, pp. 113, et seq. (O.C.G.A. §33-34-1, et seq.; former Ga. Code Ann. §56-3401b, et seq.)], to become effective March 1, 1975. Under this Act each insurer was required to make available to each insured no-fault protection to the extent of at least $50,000. The Act provided that these limits could be rejected or reduced by the insured to not less than $5,000 only "by written consent of the policyholder" (O.C.G.A. §33-34-5(a)(1)).

The Act then went further to provide that the application blank for the policy "must contain separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a)" O.C.G.A. §33-34-5(b).

The original Act failed, however, to take into account policies which would be in existence on its effective date, March 1, 1975. No application would be submitted for these policies because they would already be in existence. In order to cure this defect, the 1975 session of the Legislature amended the original Act (prior to its effective date) to add subsection (c) [O.C.G.A. §33-34-5(c)] which provided:

> "On and after the effective date of this Act, all named insureds in existing motor vehicle liability policies who have not previously responded to an offer to accept or reject the optional coverages required to be offered by this Act shall be given an opportunity to accept or reject, in writing, the optional coverages required to be offered under this section. Provided, however, that the failure of an insured to notify his insurer of his written acceptance or rejection within thirty days after written notice of the offer has been mailed by the insurer postage prepaid, by first class mail to the address stated in the policy, shall constitute a rejection of the optional coverage."

This amendment came into effect simultan-

eously (March 1, 1975) with the original Act.

As noted in International's application to this Court, although unsupported by evidence in the record, International was formed two years after the no-fault law had been enacted. In the subsequent course of its business, it issued to both Odom and Enfinger liability insurance policies containing no-fault coverage. The Odom policy was issued on August 5, 1977 based upon Odom's application of August 5, 1977 [See Addendum A hereto]. Enfinger's policy was issued on August 26, 1980 based upon an application of the same day. [See Addendum B hereto]

Neither of the applications upon which these policies were issued complied with the statutory mandate contained in O.C.G.A. §33-34-5(b) in that neither contained "separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages." Additionally,

the box on the Enfinger application for the rejection of the additional no-fault benefits was not marked by Enfinger in any manner.

Thereafter, on January 18, 1978 as to Odom, and on September 22, 1980 as to Enfinger, [Addendum C and D hereto] International allegedly forwarded to each insured a letter which it now contends was a "written offer of optional personal injury protection coverages as well as property damage coverages. . .to solicit the sale of additional amounts of coverage pursuant to O.C.G.A. §33-34-5(c)" [Petition, p. 8].

On October 22, 1980, some two years and nine months after the alleged letter to Odom and one month after the alleged letter to Enfinger, the Georgia Court of Appeals issued its decision in the case of Jones v. State Farm Mut. Auto Ins. Co., 156 Ga. App. 230 (274 SE2d 623) holding that the effect of the non-compliance of an insurer's

application with the statutory mandate of O.C.G.A. §33-34-5(b) by failing to provide separate spaces for the insured to indicate his acceptance or rejection of each of the optional coverages listed in subsection (a) of this Code section, was to leave open a "continuing offer" of the $50,000 mandatory coverage which the insured could accept even post-accident. Under this "continuing offer theory" according to the Jones Court, the insurer's defective application blank could be corrected by mailing to the insured an offer under O.C.G.A. §33-34-5(c), failure to respond to which would terminate the continuing offer, thus subsection (c) was construed as a "corrective mechanism".

This Jones rationale was subsequently followed by the United States District Court for the Northern District of Georgia in the cases of State Farm Mut. Auto. Ins. Co. v. Bates, [542 FSupp 807, June 30, 1982] and Shave v. Allstate Ins. Co.

[549 FSupp 1006, September 23, 1982].

After the issuance of their policies both Odom and Enfinger suffered serious injuries in automobile accidents thus bringing into play their respective no-fault coverages. Demand was made by each on International for $50,000 in no-fault benefits. In each case, International refused payment contending that its liability was limited to $5,000.

On March 16, 1982 (after Jones but before Bates and Shave) International instituted in the State courts a declaratory action against Odom seeking a declaration as to its non-liability for benefits in excess of $5,000, but making no mention either of any defense to liability under O.C.G.A. §33-34-5(c) nor of the constitutional issues which it now seeks to raise. Odom answered and filed his counterclaim for the $45,000 of additional benefits, statutory penalties and attorney's fees.

In August 1982 (after Jones, Bates and Shave), Enfinger filed his action against International seeking recovery of the additional $45,000 benefit together with certain statutory bad faith penalties and punitive damages. Within the thirty days provided by law, International filed its answer to Enfinger's complaint setting forth twelve separate defenses and one counterclaim for equitable reformation. None of these defenses made any contention that O.C.G.A. §33-34-5(c) had any application, nor raised any of the constitutional issues here raised.

On January 19, 1983, International filed its motion for summary judgment against Odom setting forth the some nine grounds of defense again making no mention whatsoever of any application of subsection (c) to that matter, and again silent as to the constitutional issue here.

On March 3, 1983, the Supreme Court

of the State of Georgia issued its ruling in Flewellen v. Atlanta Cas. Co., 250 Ga. 709 (300 SE2d 673) wherein it specifically rejected the "continuing offer theory" of Jones, supra, and held that the legal effect of the failure of an insurer to comply with the statutory mandate of O.C.G.A. §33-34-5(b) was that there was no written rejection of the optional coverage as required by subsection (a), thus resulting in an acceptance as a matter of law of the $50,000 PIP coverage:

> "The contract must be construed in light of the statute. The statute says that $50,000 PIP coverage is the least the insurer must offer. O.C.G.A. §33-34-5(a). The statute also says this offer of coverage may be refused only by a signed rejection in writing. O.C.G.A. §33-34-5(a) and (b) In the absence of such a rejection, the policy, therefore, provides $50,000 PIP coverage from its inception." p. 712 (Emphasis supplied)

Further, Flewellen addressed each and every issue which had been raised to that

point by International in both the Odom and the Enfinger litigation, in each instance contrary to International's position.

On March 15, 1983, Odom filed his response to International's motion for summary judgment. On that same day, International supplemented its motion for summary judgment raising for the first time in that case any contention that subsection (c) had any application to this matter and that Odom's coverage was limited to $5,000 because of his failure to respond to International's alleged letter of January 18, 1978, but again remaining silent as to the constitutional violations now complained of.

The next day, on March 16, 1983, the Supreme Court issued its ruling in GEICO v. Mooney, 250 Ga. 760 (300 SE2d 799), reiterating its Flewellen decision stating "[t]he absence of a written rejection will

be interpreted as an acceptance of the additional coverage. Flewellen, supra. This absence of written rejection or reduction of additional benefits as required by the statute is dispositive of the issue of coverage regardless of the presence or absence of signatures or the propriety of the form itself." p. 761

At pretrial conference on April 4, 1983, International amended its answer in Enfinger by adding an additional defense based upon its new subsection (c) contentions, but made no mention of any constitutional issues.

The trial court in both cases rejected International's subsection (c) defense, held that it did not constitute a rejection of the coverage, and each of the insureds was entitled to the full $50,000 coverage.

Both matters were then appealed by International to the Georgia Court of

Appeals. No constitutional issues were raised by it in either of these appeals.

On February 28, 1984, in a five-to-four decision, the Georgia Court of Appeals reversed the trial court in Enfinger, simply stating that it agreed with International that subsection (c) was applicable. The dissenting Justices vigorously disagreed with the majority on the basis of the Georgia Supreme Court's earlier decisions in Flewellen, supra, GEICO, supra, Wiard v. Phoenix Ins. Co., 251 Ga. 698, (____ SE2d _____), Stafford v. Allstate Ins. Co., 252 Ga. 38 (____ SE2d ____), and both the special concurring decision and dissenting decisions from an order of vacation of a writ of certiorari by the Supreme Court in Nalley v. Select Ins. Co., 165 Ga. App. 345, (___ SE2d _____) stating pointedly that subsection (c) had no application to post March 1, 1975 policies--all of which decisions had been ignored

by the majority.

On March 8, 1984, the Court of Appeals issued its decision in Odom reversing the trial court on the basis of its earlier decision in Enfinger.

The Georgia Supreme Court granted certiorari to review the Court of Appeals decision in both Enfinger and Odom, and after hearing argument on the two cases together on June 27, 1984, reversed the Court of Appeals decision in Enfinger on June 29, and in Odom on July 6. The basis of the Supreme Court's decision was its earlier holdings in Flewellen, supra, GEICO, supra, Wiard, supra, and Stafford, supra.

At no time either in the Georgia Court of Appeals or prior to judgment in the Georgia Supreme Court did International raise any of the constitutional issues set forth by it in its petition for writ of certiorari here.

After the Georgia Supreme Court's

decision in Enfinger and Odom, International filed its motion for rehearing, and for the first time sought to raise the equal protection issue specified by it as issue (A)1 here. See Addendum E attached. At no point has it ever raised at any level prior to its application for writ of certiorari to this Court the issues here specified by it as (A)2, (A)3, (A) 4, and (A)5. No ruling was made by the Georgia Supreme Court on the constitutional challenges enumerated in its motion for rehearing. See Addendum F and G hereto attached.

SUMMARY OF ARGUMENT

Respondents' argument in this matter is two-fold. First, Respondents argue that this Court lacks jurisdiction to issue a writ of certiorari here because of International's failure to raise in either the trial court or the appellate courts below the constitutional issues which it now seeks to have heard, all contrary to the mandate of 28 U.S.C. §1257(3), and to this Court's ruling in Webb v. Webb, 451 US 493, 68 LEd 2d 392, 101 SCt 1889 (1981). In the same vein, International's petition in this matter fails to comply with this Court's Rule 21.1(h).

Additionally, the facts in this matter as outlined in Respondents' statement of facts clearly show that International's failure to raise its constitutional issues at the appropriate time is not excused under either Cox Broadcasting Corp. v. Cohn, 420 US 469, 43 LEd 2d 328,

95 SCt 1029 (1975), nor under Missouri v. Gehner, 281 US 313, 74 LEd 870, 50 SCt 326 (1930) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 74 LEd 1107, 50 SCt 451 (1930), as contended by it.

The second part of Respondents' argument shows that this Court should not issue its writ of certiorari here because International's petition fails to show the existence of any important question of federal law which needs to be settled, or any decision of this Court with which the judgment complained of conflicts, all as required by this Court's Rule 21.1(j) and this Court's Rule 17.

ARGUMENT AND CITATON OF AUTHORITY

A. THIS COURT LACKS JURISDICTION TO ISSUE A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT IN THIS MATTER.

Petitioner failed to timely raise its constitutional claims in the Courts below.

International seeks to invoke this Court's jurisdiction to grant a writ of certiorari under 28 U.S.C. §1257(3) [Petition, p. 6]. No such jurisdiction, however, is conferred under that statute because of International's failure to raise the constitutional issues below which it now seeks to raise here.

In Webb v. Webb, 451 U.S. 493, 68 LEd 2d 392, 396, 101 SCt 1889 (1981), one of this Court's latest pronouncements on the issue which, ironically, arises from a decision by the Georgia Supreme Court, you held:

> "Because this case comes to this Court from a state court, the relevant jurisdictional statute is 28 USC §1257 [28 USC §1257]. As applied to the circumstances of this case, that statute requires that in state courts petitioner have 'specially set up or claimed under the Constitution . . .of. . .the United States' that right which [it] now seeks to have this Court enforce. 28 USC §1257 (3) [28 USCS §1257(3)]. Similarly our Rule 21.1(h) requires the petitioner to 'specify the stage in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the Court.'"

Compliance by the Petitioner here with these necessary prerequisites is utterly lacking.

As the Court will note in its petition, International failed to comply with this Court's Rule 21.1(h) both in specification as to the stage in the proceedings below wherein the question was raised, and in inclusion in its Appendix of such portion of the record which will reflect compliance

with this rule. The obvious reason for this failure is that International neither at the trial level, nor at the appellate level in the Georgia Court of Appeals, nor at the appellate level in the Georgia Supreme Court raised the issues which it now seeks to raise. Consequently, neither the trial court, nor the Georgia Court of Appeals, nor the Georgia Supreme Court passed upon any of these issues.

Petitioner's claim of exemption from the requirements of 28 USC 1257(3) is based on a distortion of the facts.

International seeks to escape the consequence of this fatal defect first by showing that "Petitioner's constitutional attack was raised in the motions for rehearing filed with the Georgia Supreme Court." It relys upon this Court's ruling the Cox Broadcasting Corp. v. Cohn, 420 US 469, 43 LEd 2d 328, 95 SCt 1029 that an issue is

properly preserved where it is raised for the first time on motion for rehearing and the Court rules thereon.

Petitioner's motion for rehearing in the Georgia Supreme Court in Enfinger is attached to this response as Addendum E, its motion in Odom being substantially identical. Plainly the equal protection claim specified as A(1) of its questions presented for review is the only constitutional issue mentioned in those motions. As further shown by the copy of the orders attached hereto as Addenda F and G denying the motions for rehearing in both cases, the Georgia Supreme Court made no ruling on this issue. Accordingly, Cox Broadcasting, supra, has no application here and offers International no exemption.

The remaining issues specified by International in its petition as questions (A)2, 3, 4, and 5 were raised by it for the first time in its petition for

certiorari. Accordingly, the carrier's only hope of obtaining a hearing on any of these claims is that it might somehow show that it was surprised by the decision sought to be reviewed, under the logic of Missouri v. Gehner, 281 US 313, 74 LEd 870, 50 SCt 326 (1930) and Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 US 673, 74 LEd 1107, 50 SCt 451 (1930). It therefore tells this Court that:

> ". . .The ruling of the Georgia Supreme Court in the above referenced cases could not have been anticipated due to the body of law construing subsection (c) of O.C.G.A. §33-34-5, upon which the petitioner had relied, and which decisions the Georgia Supreme Court earlier had the opportunity to review and reverse but chose not to do so.", [Petition, p. 11] (Emphasis supplied)

The "body of law construing subsection (c)" to which Petitioner refers are those cases cited in its statement of the case [Petition, p. 8] as the grounds for its refusal to pay Respondents' claims in the

first place, to-wit: Jones v. State Farm Mut. Auto. Ins. Co., 156 Ga. App. 230 (274 SE2d 623) (1980), State Farm Mut. Auto. Ins. Co. v. Bates, 542 F.Supp. 807 (1982), Shave v. Allstate Ins. Co., 549 F.Supp. 1006 (1982), and Nalley v. Select Ins. Co., 165 Ga. App. 345 (1983).

But each of the cited cases had either been reversed, limited, or otherwise undermined well before Enfinger and Odom even went up to the Supreme Court of Georgia. First, Jones, supra, was overruled by the Georgia Court of Appeals in Flewellen v. Atlanta Cas. Co., 164 Ga. App. 865, (300 SE2d 166) (1982). When the Supreme Court of Georgia reversed Flewellen, supra, at 250 Ga. 709 (300 SE2d 673) (1983) it also exploded the "continuing offer" theory of Jones on which Bates, supra, and Shave, supra, had depended and replaced it with the concept that every no-fault policy carried the full quantum of optional benefits from

its inception as dictated by O.C.G.A. 33-34-5(a) unless the latter were properly rejected in writing in the manner prescribed by O.C.G.A. 33-34-5(b). While a footnote to a special concurrence in Nalley, supra, at 251 Ga. 723, concedes that "one possible construction of O.C.G.A. §33-34-5" is the one Petitioner favors, the later case of Stafford v. Allstate Ins. Co., 252 Ga. 38 (___SE2d ___) (1984) stated outright that "O.C.G.A. §33-34-5(c) applies to policies in existence on March 1, 1975. O.C.G.A. §33-34-5(b) applies to applications for policies beginning on March 1, 1975. Each category of policies is governed by the respective requirements of the statute." 252 Ga. at 40. (Parallel citations omitted). See also Waird v. Phoenix Ins. Co., 251 Ga. 698 (___SE2d___) (1983), outlining the legislative history of O.C.G.A. 33-34-5(c), and strongly intimating the restricted application of subsection (c) to pre-March

1, 1975 policies.

The decision of the Supreme Court of Georgia in the case at bar was amply foreshadowed by its prior rulings. International's claimed surprise, if taken as true, could only have resulted from a refusal to read the precedents cited by its opponents.

The suspect nature of Petitioner's claimed reliance on the "body of law construing subsection (c)" is highlighted by the fact that at page 8 of its petition it seems to be saying that it relied upon the same "body of law" in sending out its written offers of optional coverages to the Respondents herein. But the letter to Respondent Odom [Addendum C] was dated and allegedly mailed on January 18, 1978, some two years and nine months before Jones, the first of the cited decisions, was even issued. The letter to Mr. Enfinger [Addendum D] was dated September 22, 1980, still one month before Jones. Even then,

Bates v. State Farm, the next in the cited line of cases was still almost two years away.

In short, Petitioner's attempt to claim refuge in the unanticipated decision exception of Gehner, supra and Brinkerhoff-Faris, supra, is at best disingenuous, and should be rejected.

Finally, Respondents note that at no point in its petition does International offer any explanation for its failure to raise its constitutional challenges when it first appealed the matter from the trial level to the Georgia Court of Appeals. In each instance, the trial court's ruling was the same as that of the Georgia Supreme Court ruling here complained of, and the constitutional ramifications, if any, identical.

As was stated by this Court in Webb, supra:

"There are also very practical

> reasons for insisting that federal issues be presented first in the state-court system. The requirement affords the parties the opportunity to develop the record necessary for adjudicating the issue. It permits the state courts to exercise their authority, which federal courts, including this one, do not have at least to the same extent, to construe state statutes so as to avoid or obviate federal constitutional challenges such as vagueness or overbreadth. This rule also insures that if there are independent and adequate state grounds that would pretermit the federal issue, they will be identified and acted upon in an authoritative manner. Finally, if the parties to state-court litigation are required to present their federal claims in the state tribunals in the first instance, those issues will be adjudicated in the state courts where necessary to dispose of the case. In most instances, such a judgment will be supported by an opinion that may well obviate any reason for our giving plenary consideration to the case. In terms of our own workload, this is a very substantial matter."

International having failed to properly raise the constitutional issues which it now wishes for this Court to

decide, under this Court's earlier decision in Webb, supra, it is without jurisdiction in the matter and cannot issue any writ of certiorari to the Georgia Supreme Court.

B. INTERNATIONAL FAILED TO COMPLY WITH THIS COURT'S RULES 21.1(j) AND 17 IN THAT IT HAS FAILED TO SHOW ANY SPECIAL OR IMPORTANT REASONS FOR THIS COURT TO REVIEW THIS MATTER ON WRIT OF CERTIORARI.

As to the lone constitutional issue mentioned by International in its motion for rehearing before the Georgia Supreme Court, (issue (A)1, petition pp. 1-2) it has failed to comply with this Court's Rule 21.1(j), as well as this Court's Rule 17. The only applicable portion of Rule 17 on considerations governing review of certiorari would be under 17.1(c) where a state court has decided an important question of federal law which should be settled by this Court or has decided a federal question in a way in conflict with applicable decisions of this Court. Here, International has not shown in any fashion how either what important question of federal law needs to be settled, or any decision of this Court

with which the judgment complained of conflicts. Indeed, nowhere in its argument (Petition, pp. 11-14) does it address this issue in any fashion. Accordingly, there is nothing to which Respondents can respond.

CONCLUSION

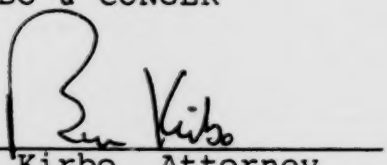
Petitioner International Indemnity Company has failed to specify, as required by this Court's rules, either how and when the issues which it seeks to have reviewed were raised and decided in the courts below or wherein this case is of sufficient importance to entitle it to review by certiorari. Ultimately, however, its petition must be denied precisely because the Court lacks jurisdiction to decide issues which were not first raised and decided below and no exception to this principle has been made out.

Accordingly, Respondents respectfully

request, and strenously urge this Court to deny International's petition for writ of certiorari and let the State court judgments be enforced immediately.

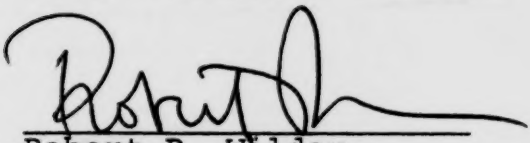
Respectfully submitted this 22nd day of October, 1984.

KIRBO & CONGER

By: 

Ben Kirbo, Attorney
for Respondent
Enfinger

TATE, MALLERNEE & WILDAU

By: 

Robert P. Wildau,
Attorney for Respondent
Odom

APPENDIX MATERIALS,

ADDENDA A THROUGH G,

HAVE BEEN LODGED

WITH THE CLERK.

CERTIFICATE OF SERVICE

GEORGIA, DECATUR COUNTY.

We do hereby certify that we have this day served a copy of the within and foregoing Response together with Addendum attached thereto upon International Indemnity Company, Petitioner, by depositing two copies of the same in the United States Mail in an envelope properly addressed with sufficient postage affixed thereto to assure the transmittal thereof to its attorney of record, to-wit:

Mr. Michael L. Wetzel
GURLEY & FOWLER, P.C.
P. O. Drawer 29825
Atlanta, Georgia 30359.

This 22d day of October, 1984.

KIRBO & CONGER

By: _____
Ben Kirbo, Attorney for
Respondent Enfinger

TATE, MALLERNEE & WILDAU

By: _____
Robert P. Wildau, Attorney
for Respondent Odom